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Supreme Court of the United States

OCTOBER TERM, 1963

No. 138

WILLIAM MURPHY AND JOHN MOODY, SR.,
PETITIONERS,

vs.

THE WATERFRONT COMMISSION OF
NEW YORK HARBOR.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITION FOR CERTIORARI FILED MAY 17, 1963
CERTIORARI GRANTED OCTOBER 14, 1963

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Record from the Superior Court of New Jersey, Appellate Division, Docket Nos. 263-61 and 264-61		
Appendix to appellants' brief consisting of portions of the record from the Superior Court of New Jersey, Law Division, Hudson County	1	1
Order to show cause	1	1
Motion of Waterfront Commission to punish John Moody, Sr. for Contempt, etc.	3	3
Exhibit E (Excerpts from)—Testimony of William Murphy before Representatives of Waterfront Commission, October 3, 1961	17	14
Exhibit F (Excerpts from)—Testimony of John Moody, Sr. before Representatives of Waterfront Commission, October 3, 1961	40	33
Exhibit G (Excerpts from)—Decision of Hon. Joseph L. Smith, J.S.C., October 4, 1961	53	44

RECORD PRESS, PRINTERS, NEW YORK, N. Y., DECEMBER 18, 1963

	Original	Print
Appendix to appellants' brief consisting of portions of the record from the Superior Court of New Jersey, Law Division, Hudson County—Continued		
Motion of Waterfront Commission to punish John Moody, Sr. for Contempt, etc.—Continued		
Exhibit H—Order of Hon. Joseph L. Smith, J.S.C., dated October 4, 1961	55	46
Exhibit I (Excerpts from)—Testimony of William Murphy before "Designees" of Waterfront Commission, October 27, 1961	57	47
Exhibit J (Excerpts from)—Testimony of John Moody, Sr., before "Designees" of Waterfront Commission, October 27, 1961	92	72
Excerpts from Exhibits introduced by Waterfront Commission in proceedings of October 27, 1961 before "Designees" of said Commission	104	83
Exhibit 1—Letter dated October 13, 1961	104	83
Exhibit 5—Letters dated October 10, 1961 and October 23, 1961	105	84
Exhibit 6—Letter dated October 18, 1961	109	87
Exhibit 7—Letter dated October 25, 1961	110	88
Exhibit 8—Letter dated October 26, 1961	111	89
Defendants' answer to motions for contempt	112	90
Defendants' notice of motion for bill of particulars	115	93
Defendants' request for jury trial	120	97
Excerpts from testimony of November 21 and 22, 1961	121	98
Appearances	121	98
Colloquy re motions	121	98
Argument re Immunity by Mr. Krieger	149	101
Colloquy	162	108
Arguments on motion to hold defendants in Civil and Criminal contempt by:	166	109
Mr. Malchman	166	109
Mr. Krieger	170	111
Argument on motion of defendants for jury trial by Mr. Krieger	175	112
Colloquy	183	117

	Original	Print
Appendix to appellants' brief consisting of portions of the record from the Superior Court of New Jersey, Law Division, Hudson County—Continued		
Excerpts from testimony of November 21 and 22, 1961—Continued		
Testimony of William Murphy—		
direct	184	118
cross	187	121
redirect	201	132
John Moody—		
direct	201	133
cross	204	135
Colloquy	209	140
Oral decision of November 22, 1961	213	143
Defendants' motion to quash subpoenas, etc.	237	165
Affidavit of Robert H. Wall in support of motion	239	167
Excerpts from sentence proceedings	242	169
Appearances	242	169
Excerpts from proceedings to settle terms of order, December 4, 1961	249	175
Judgment re John Moody, Sr., December 4, 1961	250	176
Judgment re William Murphy, December 4, 1961	253	179
Notice of appeal re John Moody, Sr.	258	183
Notice of appeal re William Murphy	258	184
Excerpts from brief for appellants, William Murphy and John Moody, Sr. on prior appeal	259	185
Statement of facts	260	185
Excerpts from appendix to brief for appellants, William Murphy and John Moody, Sr. on prior appeal	262	186
Proceedings before the Waterfront Commission of New York Harbor, May 19, 1960	263	187
Appearances	263	187
Testimony of John Moody, Sr.	264	187
Affidavit of John Moody, Sr.	276	197
Answering statement and affidavit of William Murphy	277	198
Proceedings before the Waterfront Commission of New York Harbor, May 19, 1960	280	200
Appearances	280	200
Testimony of William Murphy	281	201

	Original	Print
Proceedings in the Supreme Court of New Jersey	295	212
Order for certification	295	212
Opinion, Proctor, J.	296	213
Mandate on modification	325	241
Clerk's certificate (omitted in printing)	326	241
Order allowing certiorari	327	242
Order granting motion of respondent to require certification of additional parts of record	328	242

IN THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket Nos. 263-61 and A-264-61

Civil Actions (On Contempt).

On Appeal from Judgments of the Superior Court of New Jersey, Law Division—Hudson County.

Sat.Below: Smith, J.S.C.

In the Matter of the Application

of

Waterfront Commission of New York Harbor, to punish John Moody, Sr. for failure to obey a Subpoena.

In the Matter of the Application

of

Waterfront Commission of New York Harbor, to punish William Murphy for failure to obey a Subpoena.

Appendix to Appellants' Brief

[fol. 1]

In the Superior Court of New Jersey

Law Division—Hudson County

Docket No. L-4258-61

Civil Action

In the Matter

of

the Application of the Waterfront Commission of New York Harbor to Punish John Moody, Sr. for Failure to Obey a Subpoena.

Order to Show Cause—Filed November 1, 1961

The matter being opened to the Court by motion made by Robert A. Pin, Esq., attorney for the Waterfront Commission of New York Harbor, an instrumentality of the States of New York and New Jersey, to punish John Moody, Sr. as for a contempt of court for his failure to obey a lawful subpoena duly issued and duly served upon him by the Waterfront Commission of New York Harbor, and it appearing to the Court from the motion of Robert A. Pin, and the affidavit of William P. Sirignano, filed herewith, that a lawful subpoena was duly issued by the Waterfront Commission of New York Harbor and duly served on said John Moody, Sr., commanding him to appear at the offices of the Waterfront Commission of New York Harbor, 15 Park Row, [fol. 2] City, County and State of New York, on the 18th day of May, 1960, to testify as a witness and that said John Moody, Sr., failed and refused to obey the command of such subpoena in that he wilfully refused, without justification, to give testimony pursuant to such subpoena on the duly adjourned return date thereof, and that an order to show cause should issue, pursuant to R. R. 4:46-5(c), requiring said John Moody, Sr., to show cause before this Court why he should not be punished as for a contempt of court.

It is this 1st day of November, 1961,

Ordered, that John Moody, Sr., appear in person and show cause before this Court at the Courthouse of Jersey City, New Jersey, on the 3rd day of November, 1961 at 9:30 in the forenoon, or as soon thereafter as counsel may be heard, why he should not be punished as for a contempt of court; and

It is Further Ordered, the service of a copy of this order and of the motion and supporting affidavit certified to be true copies shall be made personally upon the said John Moody, Sr. on or before the 1st day of November, 1961. Service of the within order may be made by duly authorized investigator of said Waterfront Commission of New York Harbor.

Peter P. Artoserse, A. J. S. C.

Dated: 1st day of November, 1961.

[fol. 3]

In the Superior Court of New Jersey

Motion of Waterfront Commission to Punish John Moody, Sr., for Contempt, etc.—Filed November 1, 1961

To the Honorable Judge of the Superior Court, Law Division, Hudson County, State of New Jersey:

The Waterfront Commission of New York Harbor (hereinafter called the Commission) moves the Court, pursuant to R. R. 4:46-5(c), to punish John Moody, Sr., home address 1111 Washington Street, Hoboken, New Jersey, as for a contempt of court for failure to obey a lawful subpoena issued by the Commission for the following reasons:

1. The Commission was created by the Waterfront Commission Act, which was passed by the States of New Jersey and New York, as a body corporate and politic, to eliminate evil conditions and criminal and corrupt practices in the port of New York district [N. J. Laws 1953, c. 202, 203 (N. J. R. S. 32:23-1 et seq.)].

2. In the Fourth Report of the New York State Crime Commission [Leg. Doc. No. 70 (1953)], whose findings were concurred in by the New Jersey Law Enforcement Council [Report of the New Jersey Law Enforcement Council (1953)], and which led to the enactment of the Waterfront Commission Act by the States of New York and New Jersey, one of the evil conditions on the waterfront specifically enumerated by the Crime Commission was that known criminals were in control of important locals of the International Longshoremen's Association and of key waterfront areas [Fourth Report, pp. 23-25]. In this connection, the New York State Crime Commission found that criminal control of the ILA locals produced crime, that there were serious instances of extortion, that the financial affairs of most of [fol. 4] the ILA locals had been loosely and irresponsibly conducted, that the funds of the ILA locals were misused and their records destroyed and that the undemocratic procedures of the ILA locals helped to keep unscrupulous labor leaders in power [Fourth Report, pp. 25-32].

3. Another evil condition on the waterfront specifically enumerated by the Crime Commission was the use of the unlawful work stoppage as an instrument of coercion by the ILA [Fourth Report, p. 9]. Still another evil condition on the waterfront specifically enumerated by the Crime Commission was that the ILA controlled the Port Watchmen's Union; that the close connection between the watchmen's union and the ILA resulted in watchmen being discouraged from, and even reprimanded for, reporting thieves; and that the ILA actively opposed efforts by steamship companies to improve the watchmen system [Fourth Report, pp. 57-64].

4. In order to eliminate these evil conditions relating to port watchmen, the Waterfront Commission requires port watchmen to be licensed by the Waterfront Commission; separates the union from the port watchmen by forbidding the port watchmen to be members of a union representing longshoremen; and provides that a port watchman's license will not be granted or may be revoked if the Commission is not satisfied with the good character and integrity of the port watchman [Waterfront Commission Act, Part I, Article X; N. J. R. S. 32:23-39 et seq.].

5. In order to execute the mandate of the Waterfront Commission Act that it eliminate the evil conditions found to have existed on the waterfront, the Waterfront Commission is clothed with broad investigatory powers. Thus, the Waterfront Commission Act provides:

[fol. 5]

"ARTICLE IV.

"*General Powers of Commission*

"In addition to the powers and duties elsewhere prescribed in this compact, the commission shall have the power;

* * * * * * *

"8. By its members and its properly designated officers, agents and employees, to administer oaths and issue subpoenas throughout both states to compel the attendance of witnesses and the giving of testimony and the production of other evidence;

* * * * * * *

"11. To make investigations, collect and compile information concerning waterfront practices generally within the port of New York district and upon all matters relating to the accomplishment of the objective of this compact;

* * * * * * *

"13. To make annual and other reports to the governors and legislatures of both states containing recommendations for the improvement of the conditions of waterfront labor within the port of New York district, for the alleviation of the evils described in Article I and for the effectuation of the purposes of this compact * * *." [Waterfront Commission Act, Part I, Article IV, Sections 8, 11, 13; N. J. R. S. 32:23-10.]

And further,

"'Witness' shall mean any person whose testimony is desired in any investigation, interview or other proceeding conducted by the commission pursuant to the provisions of this act." [Waterfront Commission Act, Part II, Section 5-a(4); N. J. R. S. 32:23-85.]

[fol. 6] 6. The American Export Lines, Inc., which leases and operates waterfront piers and a terminal in Hoboken, New Jersey, employed one James H. Markley to be its Chief Security Officer in the port of New York, including Hoboken. The employment of James H. Markley commenced May 16, 1960. Prior to the commencement of his employment with American Export Lines, James H. Markley was an investigator for the Waterfront Commission and his principal assignment was to cover said piers and terminal of American Export Lines, Inc. in Hoboken.

7. On Monday, May 16, 1960, when the employment of James H. Markley for American Export Lines commenced as aforesaid, Markley, pursuant to his duties, walked onto the piers of the American Export Lines in Hoboken. Thereupon, a work stoppage began of the longshoremen and

checkers employed by the American Export Lines in Hoboken. This work stoppage, except for the morning of Tuesday, May 17, 1960 continued through Friday, May 20, 1960. The work stoppage was in effect during the times that Markley, pursuant to his duties, was on the piers of the American Export Lines in Hoboken. Since May 20, 1960, when the work stoppage ended, Markley has not set foot on the piers of American Export Lines in Hoboken.

8. Under the Waterfront Commission Act, the longshoremen and checkers who are participating in this work stoppage are required to be and are registered by the Waterfront Commission. Also, under the Waterfront Commission Act, James H. Markley, as Chief Security Officer of American Export Lines, must be and is licensed by the Waterfront Commission as a port watchman.

9. The Waterfront Commission has information that this work stoppage was a concerted effort to keep James H. [fol. 7] Markley off the piers of the American Export Lines in Hoboken, New Jersey. Accordingly, in order to determine whether this work stoppage constituted an illegal coercion of an employer (the American Export Lines) to compel such employer to limit the functions of, or to discharge, a licensed port watchman (James H. Markley) and to further determine whether any persons registered or licensed by the Waterfront Commission were participating in such illegal coercion, the Commission instituted the instant investigation.

10. In connection with such investigation, subpoenas of the Commission were duly served on May 18, 1960, on William Murphy, business agent of Local 2 of the ILA, representing longshoremen in Hoboken, New Jersey, and upon John Moody, Sr., organizer for the ILA in the State of New Jersey. (Copies of the subpoenas served upon Murphy and Moody, together with annexed affidavits of service, are annexed hereto as "Exhibit A" and "Exhibit B," respectively.) Both Murphy and Moody appeared at the offices of the Commission in response to these subpoenas on the afternoon of May 19, 1960.

11. Moody, after giving his name and address, testified that he was a union official and refused to answer any other questions. Murphy testified that he was a business agent of Local No. 2 and represented members of his local working the American Export Piers in Hoboken. He stated that he knew the pier did not work on Monday [May 16, 1960] and that it was common knowledge for the previous ten days that things were not normal at Piers A, B, and C, Hoboken [American Export Lines Piers]. Murphy then refused to answer whether this condition was related to the appointment of Markley as Chief Security Officer and refused to answer any further questions.

[fol. 8] 12. The reasons for the refusal of Murphy and Moody to testify, insofar as can be discerned, comprised the following grounds: (1) the work stoppage was a matter which the Commission had no statutory authority to investigate; (2) the work stoppage was a matter over which the National Labor Relations Board had exclusive jurisdiction; (3) the Commission had no right to investigate the work stoppage since civil litigation may ensue as a result thereof (i.e., the American Export Lines had threatened to sue the ILA); and (4) the Commission's investigation sought to inquire into privileged communications between union and management and/or between union representatives. Neither Moody nor Murphy asserted the privilege against self-incrimination although both were specifically asked if that was one of the grounds for their refusal to testify.

13. Thereupon, the Commission instituted contempt proceedings against Murphy and Moody in the Superior Court of New Jersey, Hudson County (Smith, *J. S. C.*), which, by judgment dated June 20, 1960, adjudged Murphy and Moody guilty of civil contempt and ordered that they be fined $50 each and that they be incarcerated until they obeyed the Commissioner's subpoenas. The judgment of contempt against Murphy and Moody was affirmed by the Supreme Court of New Jersey by mandate dated May 22, 1961. See *Application of Waterfront Commission of New York Harbor*, 35 N. J. 62 (1961). (A copy of the printed record upon the appeal of Murphy and Moody is annexed as "Exhibit C" and a copy of the mandate of Supreme Court as "Exhibit D.")

14. Thereupon, Murphy and Moody appealed to the Supreme Court of the United States and applied to the Supreme Court of New Jersey for a stay pending such appeal, which application was denied by the Supreme Court of New Jersey on August 14, 1961. Appellants then applied to Mr. [fol. 9] Justice Brennan of the United States Supreme Court for a stay pending appeal, which application was denied by Mr. Justice Brennan. Appellants then applied to Mr. Justice Brennan for reconsideration of his denial of a stay and for oral argument in connection with such application. This second application was also denied by Mr. Justice Brennan on September 29, 1961. (The Commission has moved to dismiss appellants' appeal to the Supreme Court of the United States, which motion is now pending. In any event, as appears more fully hereinbelow, the appeal has become moot by virtue of the subsequent proceedings herein.)

15. Finally, after affirmance of their contempt judgment by the Supreme Court of New Jersey and after all applications for stays had been denied, Murphy and Moody appeared before Judge Smith of the Superior Court, Hudson County, New Jersey, on October 3, 1961 pursuant to the mandate of the Supreme Court of New Jersey. Judge Smith directed that Murphy and Moody appear at the offices of the Commission pursuant to the Commission's subpoenas. Murphy and Moody did appear at the offices of the Commission on October 3, 1961 as directed by Judge Smith. However, except to give their names, addresses and occupations, Murphy and Moody again refused to answer all questions, this time upon a myriad of entirely new objections including the privilege against self-incrimination. All of these new and multifarious objections were overruled except the privilege of self-incrimination. The subpoenas were adjourned until October 10, 1961 in order to give the Commission an opportunity to determine whether to grant Murphy and Moody immunity from prosecution pursuant to the provisions of Section 5-b(5) of the Waterfront Commission Act (N. J. R. S. 32:23-86) and, if so, to afford the Commission an opportunity to give the notice required by Section 5-b(5) to the appropriate officials. (Copies of the transcripts of the

[fol. 10] testimony of Murphy and Moody before the Commission on October 3, 1961 are annexed hereto as "Exhibit E" and "Exhibit F," respectively.) Said Section 5-b(5) of the Waterfront Commission Act provides as follows:

In addition to the powers and duties elsewhere prescribed in this compact, the commission shall have the power:

> "To confer immunity, in the following manner: In any investigation, interview or other proceeding conducted under oath by the commission or any duly authorized officer, employee or agent thereof, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and notwithstanding such refusal, an order is made upon twenty-four hours' prior written notice to the appropriate attorney general of the state of New York or the state of New Jersey, and to the appropriate district attorney or prosecutor having an official interest therein, by the unanimous vote of both members of the commission or their designees appointed pursuant to the provisions of section three of article III of this act, that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this subdivision, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him as provided for herein.
>
> "'Immunity' as used in this subdivision means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by the unanimous vote of both members of the commission or their designees [fol. 11] appointed pursuant to the provisions of section three of Article III of this act, he have answer or produce evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or fail-

ing to answer, or in producing or failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt.

"Immunity shall not be conferred upon any person except in accordance with the provisions of this subdivision. If, after compliance with the provisions of this subdivision, a person is ordered to answer a question or produce evidence of any other kind and complies with such order, and it is thereafter determined that the appropriate attorney general or district attorney or prosecutor having an official interest therein was not notified, such failure or neglect shall not deprive such person of any immunity otherwise properly conferred upon him."

16. On October 5, 1961, Murphy and Moody appeared again before Judge Smith of the Supreme Court, Hudson County, New Jersey, for the purpose of determining whether they had purged themselves of their contempt. It was the Commission's position that the proceedings were in an interim stage, that there had been no final obedience or disobedience of the Commission's subpoenas upon the remand at this point, and that Murphy and Moody should remain in constructive custody until their appearance before the Commission on the adjournment return date of the subpoenas on October 10, 1961. However, Judge Smith, by oral decision rendered from the bench (a copy of which is an- [fol. 12] nexed hereto as "Exhibit G"), held that Murphy and Moody had purged themselves of their contempt, but further made it explicitly clear that the Commission's subpoenas still remained in force and effect and that Murphy and Moody were still required to appear at the offices of the Commission on October 10, 1961. In compliance with his oral decision, Judge Smith signed an order dated October 4, 1961 purging Murphy and Moody of their contempt and also providing that Murphy and Moody should appear on the adjourned return date pursuant to the Commission's subpoena. (A copy of said order dated October 4, 1961 is annexed hereto as "Exhibit H.")

17. On October 27, 1961 (the duly adjourned return date of the Commission's subpoenas), Murphy and Moody appeared at the offices of the Commission. Pursuant to the provisions of Section 5-b(5) of the Waterfront Commission Act, Murphy and Moody were duly granted immunity from prosecution and directed to testify. Notwithstanding such grant of immunity from prosecution, Murphy and Moody again refused to testify upon multifarious grounds, one of which was the claimed unconstitutionality of Section 5-b-5 of the Waterfront Commission Act. (The transcripts of the testimony of Murphy and Moody on October 27, 1961, are annexed hereto as "Exhibit I" and "Exhibit J," respectively.)

18. Another of the numerous grounds asserted by Murphy and Moody for their refusal to testify was that they had not been apprised of the subject matter of the Commission's investigation. Apart from the fact that such objection was waived by the failure of Murphy and Moody to assert it in their original appearances before the Commission on May 19, 1960 as aforesaid, this objection is entirely disingenuous. For the fact is that, as appears from the record of the first [fol. 13] contempt proceedings (Exhibit C), both Murphy and Moody in said original appearances before the Commission were specifically advised as to the purpose of the investigation. Further, the opinion of the Supreme Court herein (35 N. J. 62) explicitly recites at length the subject matter of the Commission's investigation, which was held to be within the statutory investigatory authority of the Commission. What is more, in their Jurisdictional Statement filed in the Supreme Court of the United States, Murphy and Moody claim that they were not apprised of the purpose of the Commission's investigation until the Commission filed its papers in the Superior Court to have them adjudged guilty of contempt; in their words, the purpose of the Commission's investigation "made its first appearance in the case in the [Commission's contempt] motion papers," (Jurisdictional Statement, p. 11). Hence, by their own argument in the Supreme Court of the United States, that they had not been informed of the subject matter of the Commission's investigation until the Commission filed its papers in Superior Court in the original contempt proceed-

ing herein. Murphy and Moody conceded that at least by such time (over a year prior to their recent appearances at the Commission in October, 1961) they had been sufficiently informed respecting the subject matter of the Commission's investigation.

19. Section 1 of Article XIV of the Waterfront Commission Act provides as follows:

> "The failure of any witness, when duly subpoenaed to attend, give testimony or produce other evidence, whether or not at a hearing, shall be punishable by the superior court in New Jersey and the supreme court in New York in the same manner as said failure is punishable by such court in a case herein pending" [N. J. R. S. 32:23-6].

R. R. 4:46-5(c) provides as follows:

> "Where a statute provides that failure of a person to obey a subpoena or order of a public officer or administrative agency or a receiver, to testify, to answer a proper question, or to produce books, papers, documents or tangible things, or that misconduct on the part of a person attending a hearing, shall be punishable by the court in the same manner as like failure or misconduct is punishable in a case pending in the court, the matter shall be brought before the court by motion supported by affidavit stating the circumstances. Upon the motion the court may issue an order to show cause, returnable in not less than 2 nor more than 10 days, requiring the person to show cause before the court why he should not be punished; or the court may issue an attachment. If the court determines that the failure or misconduct above mentioned was without justification, it may punish him as for a contempt of court."

20. Almost a year and a half has expired since the Commission's subpoenas were first served on Murphy and Moody. The validity of the Commission's investigation has already been litigated through the Supreme Court of New Jersey. However, the Commission has yet to receive any

testimony whatever from Murphy and Moody. Rather, the Commission is compelled to institute these second contempt proceedings and embark on a new round of litigation because of the refusal of Murphy and Moody to testify upon multifarious grounds that are entirely spurious and disingenuous. It is submitted that Murphy and Moody have been wilfully contumacious and that they simply refused to testify for no better reason than that they do not wish to do so.

[fol. 15] Wherefore, the Waterfront Commission of New York Harbor respectfully requests:

1. That this Court issue an order to show cause directing John Moody, Sr., to appear before this Court at a time to be fixed by the Court and then and there to show cause why he should not be punished as for a civil and criminal contempt of court for failure to obey a subpoena duly served upon him.

2. That said John Moody, Sr., be punished as for a civil and criminal contempt of court.

3. That the Commission be granted such other and further relief as to this Court may seem just and proper.

Robert A. Pin, Attorney for the Waterfront Commission of New York Harbor, 60 Hudson Street, Hoboken, New Jersey.

(Verified by William P. Sirignano on November 1, 1961.)

[fol. 17]

IN THE SUPERIOR COURT OF NEW JERSEY

EXCERPTS FROM EXHIBIT "E" TO MOTION OF WATERFRONT COMMISSION. (TESTIMONY OF WILLIAM MURPHY BEFORE REPRESENTATIVES OF WATERFRONT COMMISSION, OCTOBER 3, 1961.)

WATERFRONT COMMISSION OF NEW YORK HARBOR

Proceeding in the Matter of an
Investigation Under Article IV of the
Waterfront Commission Compact

15 Park Row,
New York, New York.

October 3, 1961,
11:30 A. M.

Appearances:

For the Commission:

ANTHONY L. PIAZZA, Esq., Assistant Counsel.

IRVING MALCHMAN, Assistant to General Counsel.

Witness:

WILLIAM MURPHY, 218 Roosevelt Avenue, Union City, New Jersey.

Attorneys for Witness:

HAROLD KRIEGER, Esq., 921 Bergen Avenue, Jersey City, New Jersey.

ROBERT H. WALL, Esq., 880 Bergen Avenue, Jersey City, New Jersey.

Present:

JOHN MOODY, 1111 Washington Street, Hoboken, New Jersey.

DUNCAN GRIFFITH, 132 Nassau Street, New York, New York.

Mr. Piazza: This is an investigation under Article IV of the Waterfront Commission Compact.

* * * * * * *

[fol. 18] Mr. Piazza: On the record.

Mr. Krieger: For the purpose of the record, we are here in response to an original subpoena issued by the Waterfront Commission, and we are here further in accordance with the direction of the judge of the Superior Court of the State of New Jersey, namely, Judge Smith, and entered into a stipulation in the court this morning on behalf of the individual now appearing, namely, William Murphy that we will voluntarily appear here prior to the effect of any warrant in response to your subpoena. However, so that we know what we are appearing for, I now request that you produce an order of the Waterfront Commission directing this investigation and I assume that you must have a written order to that effect by the Waterfront Commission of this investigation, and I ask you now for an opportunity to read it so that we know the purpose and pertinency and extent of this investigation.

Mr. Piazza: Mr. Krieger, this Commission has ordered this investigation in order to inquire into the factual background of the work stoppage that took place on May 16, 1960 and through the 20th at Piers A, B and C in Hoboken, to inquire whether or not a violation of the Compact took place. I shall produce no order other than my own statement at this time concerning my authority to conduct this inquiry.

Mr. Krieger: Mr. Piazza, I am not questioning the fact that you are an employee of the Waterfront Commission. Let me indicate it for the purpose of the record; nor am I asking you for the authority by the Waterfront Commission to have a hearing of this nature at the moment.

Mr. Piazza: It is an investigation.

Mr. Krieger: All right, investigation, but I am, at this time, requesting the order by the Waterfront Commission directing that such an investigation be had and held; also the purposes for which such investigation is to be had and [fol. 19] the pertinency. Might I, at this time, point out that the Commission is an accusatory agency expressly claiming that its function is to deal with commissions of crimes by individuals. This makes the Commission a combination of a grand jury and a punitive tribunal; and I think this is further borne out by the fact of a statement made by Mr. Piazza when we first noted our appearance that there may be, in view of certain facts, some conflict of interest between counsel, and I think that bears out the point most forcibly—more forcibly than I can possibly bring it to fore. If the purpose and pertinency and all the other full appraisals are not made so that Murphy here does not know—is not apprised and his counsel representing him is not apprised of the pertinency and purpose then, of course, he is being denied due process of law. It is well known that serious disadvantages, both legal and social, is attached to a person who is not fully apprised of the purposes of an investigation; and in the exercise of constitutional rights and due process of law, a person in an action of this nature has a constitutional right as well as statutory of being apprised of the pertinency and purpose; as this individual, brought into an investigation of this nature has a right to be confronted with any specific charges, if there are any, names of witnesses who may be called or who may have any information in support of such charges and a confrontation.

Mr. Piazza: It is not a hearing, Mr. Krieger. This is merely an investigative interview—

Mr. Krieger: I am not saying—

Mr. Piazza: (Cont.)—under oath. That's all it is and we are going to proceed. I have taken notice of your objection and I overrule it.

Mr. Krieger: Mr. Piazza, I am not saying—call it by any name you want to call it. I don't know what your distinction between investigation and hearing may be—but I assume any investigation must be based upon some basis of a purpose. This agency has no such broad powers—

[fol. 20] Mr. Piazza: I have already announced the purpose.

Mr. Krieger: Let me finish—this agency has no such broad powers and, especially, is this agency greater than the Congress of the United States of America or any grand jury that may be impanelled by either the Federal Government or State Government; to give it such broad powers of investigation to evade rights of people especially if it is done legally and constitutionally. This agency, like any other governmental body is bound and has a duty, might I say, a duty to witnesses such as Murphy here to apprise them fully in accordance with the decisions of the United States Supreme Court, as well as our State Courts of the purpose and pertinency of an investigation. Now, I've asked at the outset for an order, if any exists, for such an investigation by the Commission. I have not been informed that there is such an order or has been such an order entered by the Commission for this investigation; and as far as the purpose of this, it hasn't been fully set forth, nor the pertinency of calling at this time Murphy for a witness for investigation. Now, I respectfully make these requests of you, Mr. Examiner, as you have called yourself, and I feel that we have a constitutional right and statutory right on behalf of this individual for such information.

Mr. Piazza: I have already—

Mr. Krieger: A denial of it constitutes a denial of due process of law and, of course, under the circumstances, it is a violation of law as well as constitutional rights.

Mr. Piazza: Is that your statement, sir?

Mr. Krieger: Yes.

Mr. Wall: May I supplement that statement briefly.

Mr. Piazza: Go ahead.

Mr. Wall: In substantiation of the statement made by Judge Krieger, I cite the case of Scull v. Virginia, 359 U. S., page 344, 79 Supreme Court, page 738; and also the case of Watkins v. the United States, 178 Supreme Court—

Mr. Piazza: 78 Supreme Court.

[fol. 21] Mr. Wall: 78 Supreme Court, page 1173, wherein the following principle is upheld:

> "Unless the subject matter has been made to appear with indisputable clarity, it is the duty of the investigative body upon objection of the witness on the grounds of pertinency to state for the record the subject matter under inquiry at that time and the manner in which the propounded questions are pertinent thereto."

Mr. Piazza: I have also stated the subject matter and the inquiry and I shall now proceed.

Mr. Krieger: May I state for the purpose of the record, of course, in compliance with an order of the court, we have no alternative but to appear here and to remain until we are excused by you, of course. The record will indicate that there has been no response to the requests made by counsel for Murphy.

* * * * * * *

William Murphy, residing at 218 Roosevelt Avenue, Union City, New Jersey, appearing as a witness, having been duly sworn, testified as follows:

By Mr. Piazza:

* * * * * * *

Mr. Piazza: I want to make it clear for the record, then, that although I have sworn him again, this is a continuation on the same subpoena that was issued for which you had to appear on May 19, 1960.

Mr. Wall: Let me ask you this: You are going through the same questions and answers you have already?

Mr. Piazza: We may go through some of the same questions for which we have no answer.

* * * * * * *

Q. What is your position, Mr. Murphy?

A. Business agent, Local 2.

[fol. 22] Q. At the International Longshoremen's Association? Is that correct?

A. That's right.

Mr. Wall: Yes.

Q. And as such business agent, what are your duties, Mr. Murphy?

Mr. Krieger: At this time, in view of the refusal of the Waterfront Commission to fully apprise this individual so that we can determine rationally whether to invoke self-incrimination is to force this individual to invoke a privilege in the dark and is forcing this individual to incur a disadvantage in that there has been a denial of due process of law here and, under the circumstances, not knowing where such questions could possibly lead, not knowing the purpose and pertinency nor the objects that are intended, this individual has no alternative but to invoke the privilege which has come about as a result of the Commission denying this individual due process of law. The privilege of self-incrimination is invoked under expressed protest, the protest being based upon due process of law and the clauses of the 14th and 5th Amendments of the United States Constitution, as well as the statutory provisions in the Constitution of the State of New Jersey, and under these circumstances, the witness will now answer the question invoking his privilege.

Mr. Piazza: Read the question again, Mr. Reporter.

(Question read back.)

Q. Answer that question.

A. On advice of counsel I stand on my constitutional rights.

Q. By that do you mean your constitutional privilege against self-incrimination?

A. Yeah.

[fol. 23] Mr. Krieger: As well as the 14th Amendment of the United States Constitution and the due process and statutory provisions that I have outlined.

Q. Mr. Murphy, when did you first become aware that on May 16, 1960, a work stoppage had taken place at Piers A, B and C, Hoboken, the American Export Line Terminal?

Mr. Krieger: In view of the fact that this Commission in itself has heretofore in other proceedings indicated that a conspiracy had taken place in which William Murphy was a party thereto, and William Murphy being the same individual as appears here, and it appears in the charge as well as another proceeding making such statement and assertion by the Commission itself, and in view of the fact that the Commission has refused to fully apprise this individual of the purpose and pertinency of any specific charges, refused to confront this individual with witnesses or names of witnesses to support those charges, refused to state the connection of any with the questions involved, therefore, this witness has no alternative, despite its desire not to do so, but because of the denial of due process of law, because of the denial of the rights guaranteed by the Constitution of the United States under the 14th Amendment, to invoke the privilege of self-incrimination and it is done under expressed protest, the protest being based upon the denials I have outlined.

Q. Mr. Murphy, will you please answer the question.

* * * * * * *

A. On advice of counsel I will stand on my constitutional rights.

Q. By that do you mean the privilege of self-incrimination?

A. I answered yes.

[fol. 24] Mr. Krieger: The privilege of self-incrimination as well as the 14th Amendment and other amendments of the constitutional statutory—

Q. In other words, you refuse to answer on the grounds stated by your counsel? Is that correct, Mr. Murphy?

Mr. Krieger: He didn't refuse; he exercises his constitutional rights.

* * * * * * *

Q. You are invoking the privilege on self-incrimination?

Mr. Krieger: Right.

Q. Is that correct?

A. Yes, right.

Mr. Krieger: As well as due process of law.

Mr. Piazza: Are you going to raise this particular objection to every one of my succeeding questions?

Mr. Krieger: Yes.

Mr. Piazza: Then for the record I will just ask the question and he stands on his constitutional prerogatives. I don't like the record to be cluttered with that whole spiel every time. I would like to get this over with.

Mr. Krieger: I don't know whether I will have to interject it every time. I will try not to. As far as you now stipulate that the reasons heretofore—

Mr. Piazza: I am not stipulating. If you are going to raise that objection which you have just phrased, if that is going to be the one. I will just ask my question and it is understood that your objection is in the record to that question. Is that right?

Mr. Wall: Why don't you put it on the record that all the questions you might ask will receive the same answer.

Mr. Piazza: That is perfectly all right.

[fol. 25] Mr. Wall: It will expedite the whole thing.

Mr. Piazza: Let me ask the questions so that we will know what the questions are.

* * * * * * *

Q. Did you have any conversations, Mr. Murphy, with union officials of the ILA prior to May 16, 1960 concerning the presence of one James Markley on Piers A, B and C as a security officer for the American Export Lines?

Mr. Krieger: I object to the question and this improves upon the original statements made by me that it is necessary to have purpose and pertinency. It is indicated now by the line of questioning that one leads into another, and now this individual is being deprived of due process of law by not being given the purpose and pertinency, as well as any specific charges, as well as names of witnesses and all other factors that an individual is entitled to in such matters of this nature, that it constitutes a deprivation of due process of law, and although this individual does so with great temerity and a desire to avoid the exercise of his constitutional privilege, he has no alternative but to do so under these circumstances; and the exercise of the constitutional privilege of self-incrimination is done under great and expressed protest because of the denial under due process of law in this instance.

Q. Mr. Murphy, will you answer the question.

A. On advice of counsel I stand on my constitutional rights.

Q. In other words, you are invoking your constitutional privilege against self-incrimination? Is that correct, Mr. Murphy?

A. That's right.

* * * * * * *

Mr. Krieger: You are saying, one, he is exercising all the constitutional rights that he may have, not limited to only one.

[fol. 26] Mr. Piazza: You may have others, but I recognize the constitutional privilege against self-incrimination as being valid in a proceeding of this nature.

Mr. Wall: Plus all the statements made by Harold Krieger are included—

Mr. Piazza: In the grounds.

Mr. Wall: In the grounds.

Mr. Piazza: That is all right, except I thought we weren't going to repeat it.

Mr. Krieger: Sometimes the question has a little different angle.

Q. Did you have any conversations with the officials of American Export Line on May 16, 1960, May 17, 1960, May 18, 1960, May 19, 1960, and May 20, 1960, concerning the presence of James Markley as a security officer on Piers A, B and C, Hoboken?

Mr. Krieger: Again, when I say this, Mr. Piazza, we now come to names of individuals. There's nothing indicated here to pertinency. There's nothing indicated here as to purpose and, again, I don't want to—as you before agreed—to repeat everything I said before; but I say, under all these circumstances, a witness such as Mr. Murphy here is compelled to exercise a privilege and must do so in the dark because he is not fully apprised and for all the other reasons. You said for the purpose of this record, you say in this instance it is the same as repeated here, but he does so in great protest because he has no alternative but to exercise the privilege.

A. I take the constitutional rights.

Q. You are invoking the self-incrimination privilege?

A. That's right.

Mr. Krieger: As well as the other grounds.

[fol. 27] Q. Mr. Murphy, did you at any time during the period covered by the dates May 16th to May 20th, 1960 appear on the terminal or in the offices of the terminal at Piers A, B and C, Hoboken, in connection with the work stoppage that resulted on the days May 16th to May 20th?

Mr. Krieger: May I just point out at this time my objection, and as you have indicated, I don't want to encumber the record. You asked me not to do so. You said you would accept it as the same objection in this answer. Everything I said to the other questions would be considered to have been repeated herein. May I again repeat the exercise in this answer by self-incrimination by this individual is done under great protest with due regard and respect for this Commission, as well as the laws of this Country and the denial of due process in this instance, compels all of us under these circumstances to exercise self-incrimination, as well as the Constitution of the State of New Jersey, 14th and 5th Amendments.

Mr. Wall: I object to the question on the grounds it is too broad and not specific.

Mr. Piazza: I overrule the objection.

Mr. Wall: I know.

Q. Will you answer the question?

A. On advice of counsel I stand on my constitutional rights.

Q. By that do you mean you are invoking your constitutional privilege against self-incrimination as well as the other grounds stated by your counsel? Is that correct?

A. That's right.

Q. Mr. Murphy, did you at any time prior to May 16th, 1960, speak with one Michael McNamara, Hiring Agent at the American Export Line Piers, concerning the presence of James Markley as a security officer on those particular piers?

Mr. Krieger: Again, for the purpose of the record, I repeat what I said heretofore without encumbering this [fol. 28] record, which I am trying to avoid. Mr. Piazza, I think you will agree with me. I repeat again fully what has been said heretofore and I add thereto the following: Heretofore, the Waterfront Commission—I don't know whether you know this, Judge Wall—had formally made an accusation that Michael McNamara, Frank Rump and others, together with William Murphy and John Moody, did wrongfully, did wrongfully attempt by means of a work stoppage to coerce and, in fact, they did coerce with the man who appears here, William Murphy, and who is the William Murphy. Again, I say, in view of that statement heretofore made by the Waterfront Commission in formal papers that are presently in the possession of the Waterfront Commission, have been issued publicly by the Waterfront Commission and, as well as the public relations issued by the Waterfront Commission to that same effect—made by the Waterfront Commission to that same effect, and a failure of the Waterfront Commission to, one, issue its order for this type of investigation and indicating this investigation, further, failure to give it purpose and pertinency and, further, even to mention here in these proceedings at this time referring to what appears to be one and the same instance that appears in the others, again, I say the witness has no alternative under these circumstances because of the denial of due process of law to invoke the privilege—of the constitutional privilege of self-incrimination and due process of law of the United States as well as the State of New Jersey. I assume this will go for the State of New York, if there is a question of our being here, it's only a matter of investigation of the State of New Jersey. It is only an arm of the State of New Jersey being present in this room.

[fol. 29] Mr. Piazza: Mr. Krieger, as I have previously stated, I recognize the invocation of the constitutional privilege of self-incrimination.

Mr. Krieger: I know you do. I am very happy you are living up to the Constitution.

Mr. Piazza: However, I don't recognize any other ground that you have stated.

Mr. Krieger: I didn't expect you would.

* * * * * * *

Mr. Piazza: I overrule the rest of them. I do recognize the ground against self-incrimination. Then I direct Mr. Murphy to answer the question.

Mr. Krieger: He will answer that—it is stated in the record, the statement I made about the issue by the Waterfront Commission of the public statement, as well as public releases accusing William Murphy of the offense indicated by me. You admit such a publication had been made by the Waterfront Commission?

Mr. Piazza: If you are referring to the issuance of a notice of hearing, wherein Mr. Murphy was named as an actor in concert with certain others in a work stoppage, such a document was issued by the Commission and—

Mr. Krieger: And also public releases about such a stoppage and such an active part being played by Mr. Murphy?

Mr. Piazza: Since I had no part in any releases, I am not prepared to indicate what happened with respect to any release. May I ask you this: I don't see any more relevancy—

Mr. Krieger: I want the pertinency.

Mr. Piazza: There is no pertinency involved.

Mr. Wall: He said no pertinency involved.

Mr. Piazza: The pertinency was stated by me when I said at the beginning that this inquiry concerned a work stoppage that took place on May 16th to May 20th on Piers A, B and C, Hoboken.

[fol. 30] Mr. Krieger: Is that the same instance that I have referred to?

Mr. Piazza: Yes, it is the same incident, the notice of hearing against McNamara. That is the one you are talking about?

Mr. Krieger: There was a notice of hearing against McNamara and others. There was a newspaper issue released by the Waterfront and it appeared in all the outstanding papers in New Jersey. Headlines of publication by your public relations man employed by this Commission.

Q. Will you answer the question, Mr. Murphy?

A. On advice of counsel I stand on my constitutional rights.

Q. By that, I take it, you mean you stand on your constitutional privilege against self-incrimination and the other grounds which I overruled which were stated by your counsel?

A. That's right.

Mr. Piazza: All right, Mr. Krieger and Mr. Murphy and Mr. Wall, since you are taking this position, which is your prerogative, any other questions that I might ask will receive the same answer; is that correct?

Mr. Krieger: Yes. Any question of the same subject matter relating to the same subject matter as indicated herein that could possibly involve incriminating himself, he would exercise and enforce his privilege as indicated by me and he will follow due course as far as constitutional rights.

Mr. Piazza: All right. So, therefore, let the record be clear that I am now terminating this particular interview for today since the counsel for Mr. Murphy informed me that to any further questions concerning this episode at the American Export Line Piers on May 16, 1960, namely, the work stoppage that occurred there will receive the same [fol. 31] answer, that is to say, the constitutional prerogatives would be invoked—

Mr. Krieger: Let me make the statement for myself.

Mr. Piazza: (Continuing) —therefore, I now adjourn—

Mr. Krieger: Let the record indicate this:—

Mr. Piazza: You want to make a—

Mr. Krieger: Mr. Murphy will exercise whatever constitutional rights he may have in response to any question that would possibly require an exercise of his constitutional rights as I have indicated. He is here prepared to answer any question that may have been propounded to him, and will do so with due regard to constitutional right. His answer thereto will be considered. He has a privilege and right to exercise constitutional rights and you would recognize constitutional rights being invoked.

Mr. Piazza: Do you have anything to say, Mr. Wall?

Mr. Krieger: I still have.

Mr. Piazza: Close the record at this time. I want to— you are going to appear again in court?

Mr. Krieger: We are going to appear tomorrow morning in court, that's correct.

Mr. Wall: 9:30. We have been ordered by the court.

Mr. Krieger: We will only be gone an hour or so, as far as that is concerned. What is your point, Mr. Piazza?

Mr. Piazza: Then I will close the interview for today and adjourn it until the 10th of October, 1961.

Mr. Krieger: So that the record is clear, number one, we are here today in response to a subpoena; we are here today in response to an order of the court; we are here today so that there can be no question of our desire to [fol. 32] answer any and all questions that may be propounded—that may be propounded—and that is what we are here for, voluntarily appearing to stay here as long as you may require to answer any question, but we are not here to agree to an adjournment on that which we were supposed to complete today for the purpose of this record.

Mr. Piazza: Let me explain, Mr. Krieger. I am adjourning this subpoena to the 10th for this reason: That since Mr. Murphy chooses—which is his privilege—to invoke his constitutional prerogative against self-incrimination, we will take up the matter with the appropriate—the Commission will take up the matter with the appropriate District Attorney and may confer immunity on Mr. Murphy.

* * * * * * *

Mr. Krieger: Yes, sir.

Do I understand that the reason why you are adjourning it is to see whether or not you can get immunity for this individual, to determine whether or not such immunity can be secured?

Mr. Piazza: No, no. Let me explain it to you, Mr. Krieger. Under the law we have the right—

Mr. Krieger: I know what the statute says.

Mr. Piazza: —to give immunity.

Mr. Krieger: You have no right to give any immunity in the State of New Jersey.

Mr. Piazza: Yes, we do.

Mr. Krieger: No, you have no such right. You have no such right to grant such immunity in the State of New Jersey. My good friend, the man beside you will indicate—

Mr. Malchman: Mr. Krieger—

Mr. Krieger: I am aware of the section of the statute.

[fol. 33] Mr. Malchman: The State of New Jersey, as well as the State of New York, has enacted Section 5-B5 of the Waterfront Commission Act empowering the Commission to confer immunity in the manner prescribed in that section. That section, as I said, was enacted by the Legislature of New Jersey, as well as by New York. That immunity section requires the Commission to give 24 hours prior written notice to the appropriate Attorney General of the State of New York or the State of New Jersey.

Mr. Krieger: Does it say Attorney General, State of New Jersey?

Mr. Malchman: Yes.

Mr. Krieger: Specifically?

Mr. Malchman: "and to the appropriate District Attorney or Prosecutor having an interest therein." In order to consider whether or not to grant immunity pursuant to this explicit section and in order to give the appropriate notice of immunity, if it is decided to give immunity to the described officials, this proceeding, as Mr. Piazza said, is continued until October 10th.

Mr. Krieger: Mr. Malchman, with all due deference to you and your ability as an attorney, and as an appellate lawyer, which I respect, as you know, even though the Supreme Court may not have gone along with you too well, we are here today for the specific purpose—we are here in response to the court's direction. If you have any action in the future, that is a matter to be considered in the future. When we are through today, we are through to go back in the court tomorrow and say this man has responded; what, if anything, you may do in the future is something that we can cross the bridge when we come to it. Until such time, I don't think it is fair, nor is it fair on your part to tie this [fol. 34] matter in with some other matter that you may contemplate doing in the future. We are here for a specific purpose and limited to that purpose. I can assure you this: that if, in the future, you have a desire to have this man present for any purpose—within your jurisdiction—he will be voluntarily present. It won't be necessary to issue processes of your subpoena but, as far as this proceeding is concerned, as far as this instance is concerned, as far as this purpose is concerned, it has been served. What you may do in the future, between now and the 10th, or what you may decide in the future, that is entirely up to you. I don't even want to know about it. You don't tell me anything. You follow a—

Mr. Malchman: Mr. Krieger, you may take any position you want. This subpoena is being continued for the purposes that I have indicated, namely, the Commission is going to determine whether it wishes to confer immunity upon this witness, and if it does make that decision to give the appropriate notice required by statute—

Mr. Krieger: Mr. Malchman,—

Mr. Malchman: May I finish my statement:

Mr. Krieger: Yes. I'm sorry. I don't want to interrupt you.

Mr. Malchman: —For that purpose, this investigation is being adjourned. It is being continued pursuant to the same subpoena until 10:00 o'clock, October 10th.

Mr. Krieger: Mr. Malchman, for the purpose of the record, do you agree that we have complied with the order of the court and the subject matter that was before the court? Have we complied in that respect fully? And if you don't agree, we will stay here until you do. We are ready to [fol. 35] answer any questions you may have. If there is any question—

Mr. Malchman: Mr. Krieger,—

Mr. Krieger; Wait a minute. Robert, call Judge Smith on the telephone now. We are here to answer any question you may propound. We don't want to go to court tomorrow and for you to say we have not complied with an order.

Mr. Malchman: The order of the court is that the subpoena be complied with and that testimony be given pursuant to the subpoena. Now, Mr. Murphy has taken his privilege. He has not yet testified. The subpoena is being adjourned for the purpose of determining whether or not we wish to confer immunity. There has been no final compliance with the subpoena, no final obedience to the subpoena. Until the Commission makes that determination—

Mr. Krieger: My friend, Mr. Malchman, do I understand from you that there might be no compliance with the subpoena here? Do I understand my sitting here doesn't exist? Do I understand Murphy's sitting here doesn't exist? Do I understand that there is no compliance with the subpoena if the individual answers the question, and the answer given is that he exercises constitutional rights and privileges? Isn't that an answer? Hasn't that been construed and determined to be an answer? Of course, it's an answer. Now, if you say for one moment that he is not answering all the questions in accordance with his constitutional rights, I want that stated now and we will call Judge Smith up but, I don't want to leave this room with any impression that he hasn't complied with the order of the court. I don't want you to appear tomorrow and say he hasn't complied with the order of the court because I am here for the purpose of complying with the order of the court.

[fol. 36] Mr. Piazza: Does this mean you are in fear that we will take the position you are still in contempt?

Mr. Krieger: Right.

Mr. Piazza: I want a question raised in that respect—

Mr. Malchman: The witness is still under the subpoena and we expect him to return pursuant to the subpoena.

Mr. Krieger: I don't recognize that subpoena after today.

Mr. Malchman: I thought you wanted additional—

Mr. Krieger: I am here today and I will not recognize that subpoena. I will appear voluntarily on any date fixed. I will appear with another subpoena, but for that subpoena we are here for that purpose. We are here for that purpose. We are actually here to answer that subpoena fully. I want to know from you, Mr. Examiner, is there any further questioning that you have at this time?

Mr. Piazza: No.

Mr. Krieger: All right, that's all I want to know.

Mr. Piazza: You are excused, Mr. Murphy.

Mr. Krieger: And he has complied with your—

Mr. Piazza: He has invoked the constitutional privilege which I recognize as self-incrimination. Now, the subpoena is adjourned in order that we might consider the immunity question, that's all, to the 10th.

Mr. Krieger: I don't think that is—

Mr. Piazza: Your position is clear.

Mr. Krieger: Our position is clear and we are here.

Mr. Piazza: Our position is clear.

[fol. 37] Mr. Krieger: I don't like this hocus pocus in between cloak-and-dagger-type proposition. We are here, completely here voluntarily, as we told the court, and the court recognized we are going over voluntarily. We are complying and there is no question about our compliance. Mr. Piazza recognized our right to invoke the constitutional privilege, which was done when it became necessary to do so. If there was any violation of law it was by the Waterfront on due process of law. I say this to Mr. Piazza and his associate, if they, at any other time, want to see Mr. Murphy, he will be made available to them. If they at any time want to question Mr. Murphy he will be made available for any purpose in accordance with law and his constitutional rights. That's all.

Mr. Piazza: Close this interview.

(12:30 P.M.)

[fol. 38]

In the Superior Court of New Jersey

Excerpts From Exhibit "F" to Motion of Waterfront Commission. (Testimony of John Moody, Sr., Before Representatives of Waterfront Commission, October 3, 1961.)

WATERFRONT COMMISSION OF NEW YORK HARBOR

Proceeding in the Matter of
an Investigation Under Article IV of
the Waterfront Commission Compact

15 Park Row,
New York, New York.

October 3, 1961,
12:40 P.M.

Appearances:

For the Commission:

Anthony L. Piazza, Esq., Assistant Counsel.

Irving Malchman, Esq., Assistant to the General Counsel.

Witness:

John Moody, Sr., 1111 Washington Street, Hoboken, New Jersey.

Attorneys for Witness:

Harold Krieger, Esq., 921 Bergen Avenue, Jersey City, New Jersey.

Robert H. Wall, Esq., 880 Bergen Avenue, Jersey City, New Jersey.

Present:

Duncan Griffith, 132 Nassau Street, New York, New York.

Mr. Piazza: Investigation under Article IV of the Waterfront Commission Compact.

* * * * * * * *

[fol. 39] Mr. Krieger: May I for the purpose of the record ask whether or not you have an Order by the Commission setting forth the purpose of this investigation?

Mr. Piazza: For the record, let me state that this interview on the record concerns a work stoppage that took place on May 16th through May 20, 1960 at Piers A, B and C, in Hoboken, American Export Line Terminal. And that we are inquiring into the factual background of that work stoppage. And in that connection we are now interrogating Mr. Moody, who is here pursuant to subpoena and to the mandate of the court in New Jersey.

Mr. Krieger: Now, in view of the statement made by Counsel and the failure to produce an Order of the Commission for such an investigation, I assume, Mr. Piazza, that no such Order has been made by the Commission.

Mr. Piazza: I don't feel that I am required to answer that particular question. We are authorized to conduct this matter and that's as far as I can go.

Mr. Krieger: I ask you directly: Has an Order been made or entered by the Commission at any time prior to the issuance of this subpoena or prior to the date?

Mr. Piazza: Mr. Krieger, my answer stands as I said it.

Mr. Krieger: You refuse to advise Counsel or the witness that an Order or lack of Order has been made by the Commission for such an investigation?

Mr. Piazza: The matter was ordered by the Commission and that's as far as I can go.

Mr. Krieger: Have you such an authorization?

Mr. Piazza: I don't have to demonstrate such an authority.

Mr. Krieger: I would like to examine the Order of Investigation in this instance—

Mr. Piazza: I am sorry.

Mr. Krieger: (Continuing) as to pertinency and purposes.

[fol. 40] Mr. Piazza: I have already indicated the scope of the inquiry and I am [illegible] ready to proceed.

* * * * * * *

John Moody, Sr., residing at 1111 Washington St., Hoboken, New Jersey, appearing as a witness, having been duly sworn, testified as follows:

Mr. Piazza: Let the record reflect that this is a new interview but under the subpoena that was issued and on which Mr. Moody appeared on May 19th, 1960.

By Mr. Piazza:

Q. Would you give your name and address to the reporter.

A. John E. Moody, 1111 Washington Street, Hoboken, New Jersey.

* * * * * * *

Mr. Krieger: I might say at this time, I desire the presence of one of the Commissioners of the Waterfront Commission. I would like to have him make certain statements for the record. Due to the fact that this is an ordered investigation, I assume, although there has been no statements made to the effect by Mr. Piazza, although I have asked him to make such statements, and he refused to do so, I would like to examine or have statements made by the Commission itself or the Commissioners as to the purpose and pertinency of this investigation, and whether or not they have issued an Order; or in the alternative that the clerk or the Secretary of the Commission appear here for the purpose of producing such a statement.

Mr. Piazza: The record will hold your request. I deny it.

[fol. 41] Q. Mr. Moody, would you give your position, please?

A. I am an organizer of the I. L. A. in the State of New Jersey.

Q. In that position and in respect to that position, what are your duties, Mr. Moody?

Mr. Krieger: And for the purpose of the record, I object to the question in that there has been a failure to produce any Order of the Commission here, there is a failure to state the purpose of this investigation, the pertinency of this question and further, that I have asked for such purpose and pertinency and now I ask you for the purpose and pertinency of the statement, detail the specific charges that may concern this individual, also the names of any witnesses to support such charges and a confrontation with such witnesses. I make these requests on the grounds of due process of law and the right of a fair hearing and examination. I am pointing out that the Commission is an accusatory agency expressly claiming that its function is to deal with commissions of crime by individuals. This makes the Commission a combination of a Grand Jury and a punitive tribunal. And if the purpose and pertinency and all the other full appraisals above described have not been made, then Moody is forced under these circumstances to make a choice on whether or not to invoke privileges guaranteed by the Constitution and that force in a setting that denies him due process of law. That being so, there are serious disadvantages that he is placed in both legal and social, which attach to a person who is compelled to invoke the privilege of self incrimination. It constitutes a denial of due process of law to force this man to choose to invoke, at such a disadvantage the privilege for self incrimination. The Waterfront Commission, by refusing to give us full ap- [fol. 42] prisal from which we would be able to determine rationally whether we need to invoke self incrimination, in forcing us to invoke a privilege in the dark, and is forcing us to incur the disadvantages above mentioned in the dark, which is to state, without due process of law. And, therefore, under the circumstances this witness must invoke the privilege of self incrimination under protest. The protest, once again, that such invoking of privilege has come about as a result of the Commission's denying and denial of due process of law. Self incrimination privileges are invoked under great protest and express protest, protest being both upon the due process clause of the 14 and Fifth Amendments of the United States Constitution and statutory provisions of the States of New York and New Jersey, and particularly the State of New York, as well as the constitutional provisions of the States involved.

Mr. Piazza: Mr. Krieger, let me state again, that we are inquiring into the possible violations of the Compact in connection with a work stoppage that took place on May 16th through May 20th at Piers A, B and C in Hoboken. And to that end we are requesting Mr. Moody to testify here today.

Mr. Krieger: May I point out for the purpose of the record that the Commission heretofore has made affirmative statements of a public nature in which the Commission did affirmatively state that this individual, namely John Moody, has been involved in conspiracy with others to perform certain acts which may be determined to be legally, in that they have alleged that coercion and force was used by this individual with others' to bring about an act which they contend to be illegal in both formal papers filed as well as public utterances made by the Commission through its representatives.

Mr. Piazza: Mr. Krieger, let me first state, in the Notice of Hearing you are referring, no conspiracy was alleged; [fol. 43] and secondly, I overrule all objections save the objection of the invocation of the privilege of self incrimination, and, therefore, I direct Mr. Moody to answer the question.

Mr. Krieger: So there can be no question about it, the Commission has stated in public and in formal papers filed by the Commission that this individual, John Moody, did with others coerce, force, and did in fact act with others to perform certain acts and that that constitutes, as I think all recognize, when it's alleged that he did in concert with others force and do certain acts. It constitutes a conspiracy when he acted in concert there. So your word of "conspiracy" or your use of the word is a conclusion, because the facts stated by the Commission constitute such, in that it's alleged that he did act in concert with others to do these acts that they complained of, as illegal acts.

Mr. Piazza: I am directing Mr. Moody to answer.

Mr. Wall: Let me clarify for the record as far as this situation is concerned. We cite the case of Scull versus

Virginia 359 U. S. page 344, 79 Supreme Court, page 738; we also cite the case of Watkins versus United States 77 Supreme Court, page 1173, wherein this principle was upheld. "Unless the subject matter has been made to appear with indisputable clarity, it is the duty of the investigative body, upon objection of the witness on the ground of pertinency, to state for the record the subject matter under inquiry at that time and in the manner in which the propounded questions were pertinent thereto."

Mr. Krieger: Let me further add that—Mr. Wall, if I may—in view of the fact there is a failure to state pertinency, in view of the fact there is a failure to state purpose, in view of the fact that there is a failure to produce an Order here, in view of the fact that questions arise as [fol. 44] to whether or not the Commission under these circumstances even has jurisdiction, statutory or otherwise, and in view of the fact that the action of the Commission in this instance may be out of bounds of its jurisdiction, in view of the fact that the allegations made herein pertain to evidently a labor matter which is presently the subject matter before the United States Supreme Court, and in view of the fact that the United States Supreme Court is now called upon to determine whether or not to admit an appeal or issue a writ of certiorari, in view of the fact that the Waterfront Commission has filed a brief in which the Waterfront Commission has asked that the matter be dismissed because of the question of jurisdiction in preservation of all the rights—in view of the fact we have no alternative but to exercise certain constitutional rights and exercise due process of law so that all of the issues can be properly preserved, we are arguing and setting forth these points in the record, so that the United States Court, if it becomes necessary, will be fully apprised of anything that happens here, or any other court which has contempt jurisdiction.

Mr. Piazza: What's the point of your statement? Are they being set forth as grounds for invoking the constitutional privilege of self incrimination?

Mr. Krieger: As well as due process of law.

Mr. Piazza: I overrule everything except the invocation, except the privilege against self-incrimination.

Mr. Krieger: And let the record indicate that we are here in response to a subpoena and let the record indicate that we are here in response to the court—Superior Court of the State of New Jersey, so there be no question of the [fol. 45] individual's presence here for the purpose of answering your questions in that respect, and limited to that respect.

Q. Mr. Moody, I direct you to answer the question concerning your duties. What are your duties as organizer of the I. L. A.?

A. On advice of counsel I stand on my constitutional grounds.

Q. By that you mean you are invoking your constitutional privilege against self-incrimination as well as the other grounds which I overruled?

A. That's right.

Q. Mr. Moody, would you tell us when you first became aware of labor trouble at Piers A, B and C in Hoboken on or about May 16—during the period covered from May 16, 1960, through May 20, 1961?

Mr. Krieger: Mr. Piazza would you at this time stipulate the reason heretofore given covering the purpose of this question as well as to try to save time.

Mr. Piazza: Sure.

Mr. Krieger: May I also indicate at this time the necessity and reason why I urge that there be a full disclosure of pertinency and that there has been a failure to do so and, therefore, I urge that as an additional ground, and this question is indicative of the failure of the purpose of setting forth purpose and pertinency as well as other reasons heretofore given.

Mr. Piazza: As I previously stated, I overrule all grounds except the invocation of the privilege against self-incrimination.

Q. Would you answer the question?

A. On advice of counsel I stand on my constitutional grounds.

Q. By that you mean that you are invoking your constitutional privilege against self-incrimination as well as other grounds which were overruled by me?

A. Yes.

* * * * * * *

[fol. 46] Q. Mr. Moody, with respect to the work stoppage that occurred on May 16th, 1960, at Piers A, B and C in Hoboken, did you have any conversations with any of the union officials about the presence of one, James Markley, as a security officer on the said terminal?

Mr. Krieger: Of course, my objection is noted here and again the question of pertinency; and, again, now it points out to my request heretofore of the disclosure being made as to names, witnesses, times and places as well confrontation of any charges or anything.

Mr. Piazza: I overrule all objections save the invocation of the privilege of self-incrimination.

Q. Mr. Moody, I direct you to answer.

A. On advice of counsel I stand on my constitutional rights.

Q. By that you mean that you invoke your privilege against self-incrimination as well as the other grounds that I overruled; is that correct?

A. That's correct.

Q. Mr. Moody, did you have any conversations covering the work stoppage that occurred on May 16th, 1960 with officials of American Export Line, specifically Leland Andrews or others, such as Captain Blackledge, concerning the presence of James Markley on the terminal as a security officer?

Mr. Krieger: Again I might say so that there can be no question about all the reasons heretofore given—are acknowledged as reasons now for the witness's rights for the exercise of his constitutional right—and might I restate that a great and express protest that this witness is being compelled to exercise his constitutional privilege in that there is an evident denial of due process of law.

Mr. Piazza: I refuse all grounds except the invocation of the privilege of self-incrimination.

[fol. 47] Q. I direct you to answer.

A. On advice of counsel I stand on my constitutional rights.

Q. And by that I take it you mean you invoke your privilege against self-incrimination as well as the grounds I overruled?

A. That's right.

Mr. Krieger: You recognize the right of his use of his privilege of the constitution?

Mr. Piazza: I did recognize that.

Mr. Malchman: Notwithstanding the fact that it was probably waived.

Q. Mr. Moody, were you physically present at Piers A, B and C, in Hoboken, on May 16, 17, 18 and 19 or 20th, 1960?

Mr. Krieger: Again, for the purpose of the record, whatever I have said heretofore by way of objection and reasons and requests made, are again repeated at this point without necessity of repeating them fully and as well as requests for a disclosure, are again repeated in this instance.

Mr. Piazza: I overrule all except the invocation of the privilege against self-incrimination.

Q. I direct you to answer, Mr. Moody.

A. On advice of counsel I stand on my constitutional rights.

Q. By that I take it you mean you are invoking the privilege against self-incrimination?

Mr. Wall: And all the others.

Q. And all the others which I have overruled?

A. Yes.

Q. Mr. Moody, did you have any conversations with Michael McNamara on May 16th, 17th, 18th, 19th or 20th, 1960, concerning the presence of Markley, James Markley, a security officer on the Hoboken Terminal?

Mr. Krieger: Again, for the purpose of the record, all the reasons heretofore given are again repeated; again, [fol. 48] the pertinency is not indicated here and the record does not indicate the purpose or the reasons therefore.

Q. I direct you to answer. I overrule all objections except the invocation of the—

A. On advice of counsel I stand on my constitutional right.

Q. I take it you mean the privilege against self-incrimination as well as other grounds which I have overruled?

A. That's right.

Q. Mr. Moody, did you ever meet with any of the executives of American Export Lines with respect to the settlement of the dispute concerning Markley's presence as a security officer on Piers A, B and C in Hoboken?

Mr. Krieger: Again, for the purpose of the record, whatever I have said before is repeated fully and again I make a request for the expression of pertinency and for this examination to state pertinency or purpose.

Mr. Piazza: Well, I deny all requests and I overrule all your objections except the invocation of the privilege.

Q. I direct you to answer.

Mr. Krieger: And secondly, confrontation of witnesses is repeated here.

Q. I direct you to answer.

A. On advice of counsel I stand on my constitutional rights.

Q. By that, I take it, you are invoking the privilege against self-incrimination as well as all other grounds stated by counsel which I overruled; is that right?

A. That's right.

Q. Did you ever speak to Michael McNamara prior to May 16th, 1960, concerning the presence of James Markley as a security officer on Piers A, B and C, Hoboken?

Mr. Krieger: Again, for the purpose of the record, all the things which I have said heretofore, objections made, [fol. 49] requests made for exhibition of purpose, demonstration of pertinency, witnesses, confrontration of the witnesses as well as now, so that there be no question about it, to determine the jurisdiction of whether or not the Commission has jurisdiction for these purposes. All those reasons—

Mr. Piazza: I overrule all except the invocation of the privilege.

A. On advice of counsel I stand on my constitutional rights.

Q. You invoke the privilege of self-incrimination; is that correct?

A. Yes.

Q. Now, Mr. Moody, did you at any time issue orders for a work stoppage on Piers A, B and C, Hoboken, because of the presence of James Markley on Piers A, B and C?

Mr. Krieger: Again, for the purpose of the record, all objections heretofore stated are repeated, as by agreement, and I say again, not only that, but the question of jurisdiction becomes quite apparent and it becomes evident, and this witness under great protest, and express protest must use self-incrimination, and abuse therefore is being based upon a denial of due process of law in this instance and all rights and denial of rights contracted by the 14th and Fifth Amendments of the Constitution as well as all the statutory provisions.

Mr. Piazza: I overrule all the objections except the invocation of the privilege of self-incrimination.

A. On advice of counsel I stand on my constitutional rights.

Q. It take it by that you are invoking the privilege of self-incrimination as well as the other grounds which I have overruled?

A. That's right.

Q. Mr. Moody, have you since May 16th, 1960, issued any instructions concerning work stoppages either commencing or stopping the stoppage at Piers A, B and C, Hoboken?

[fol. 50] Mr. Krieger: Again, for the purpose of the record, I repeat for the purpose of the record all the things we have heretofore said by stipulation. It is not necessary to detail all the other objections and statements, requests heretofore made for pertinency, purpose as well as specific charges, if any, and the support of the statements, names of witnesses and confrontation; again I repeat this witness must under express and great protest use and exercise constitutional rights, and deprivation of due process of law.

Mr. Piazza: I overrule all the objections except the invocation of the privilege of self-incrimination.

Q. I direct you to answer.

A. On advice of counsel I stand on my constitutional rights.

Q. By that I take it you invoke the privilege against self-incrimination as well as the other grounds which I overruled; is that right?

A. That's right.

Mr. Piazza: Mr. Wall, Mr. Krieger and Mr. Moody, to all other questions that I will ask concerning this particular matter under investigation, I will receive the same answer that you have already given; is that correct?

Mr. Krieger: No. I would like to say, so that there could be no question about it, that this man is prepared to answer any and all questions you may put to him. That's what he is here for today.

Mr. Piazza: But you will invoke the privilege?

Mr. Krieger: Wherever it becomes necessary for him to do so and for the other reasons given, he will exercise whatever rights he may have.

Mr. Piazza: I am going to continue to ask him questions concerning this particular episode. So to those questions will you continue to invoke the same privilege?

[fol. 51] Mr. Krieger: We are here to answer all the same questions and he is here for that purpose and will answer all questions, and will exercise constitutional rights wherever the same becomes necessary to do so.

Mr. Piazza: In other words, if I ask more questions concerning the May 16th through the May 20th work stoppage you will continue to invoke the privilege?

Mr. Krieger: Wherever it becomes necessary to do so.

Mr. Piazza: Where won't it become necessary to do so?

Mr. Krieger: I don't know. You tell me. I don't know your purpose and pertinency yet.

Mr. Piazza: I have already explained it, Mr. Krieger. At this point I will conclude this interview and issue instructions to Mr. Moody to return on May 10th. I am adjourning this subpoena to October 10th, 1961 at ten A. M., in order that we may give appropriate notice to the district attorneys involved for the conferral of immunity to Mr. Moody. That's all.

Mr. Malchman: If the Commission decides to give him.

Mr. Piazza: Of course.

Mr. Krieger: So the record is clear, this man is here to answer any and all questions. He appeared voluntarily too. He complied with the Order of the court. I don't want any questions raised as to that.

Mr. Piazza: If he didn't he would be held in contempt. It's my understanding that the man may plead the constitutional privilege. There is no question about it. If he deems it might incriminate him.

Mr. Wall: Let me state for the record that I take a general exception to the rulings of Mr. Piazza in this record or the other record and we also state we have fully complied with the Order of the Court.

[fol. 52] Mr. Krieger: The Judgment of the Superior Court is that the subpoena be obeyed and performed.

Mr. Malchman: At this time there has been no final obeyance or disobeyance, no final obedience or disobedience of the subpoena which is being adjourned.

Mr. Krieger: We are here to answer all questions, so there is no question raised that we weren't here or this wasn't terminated by reason of the actions of the Commission. We are here to answer. If there are any further questions, we are here to answer them. I don't want any statements saying we have not *responded*; and I think a person has a right to exercise constitutional rights. That constitutes an answer too. And we are here for that purpose, Mr. Piazza. I don't want any hocus pocus underneath the table offered as statement of fact by you or anybody else of the Commission. We are here for that purpose and I—don't want—I want it understood here that we are here for that purpose. And I don't want any misunderstandings or misstatements made.

Mr. Piazza: Mr. Krieger, it's quite clear you may invoke the privilege. I have stated that for the record.

Mr. Krieger: I know what you have stated and I know what I have stated.

Mr. Piazza: In justification of my adjourning this matter until the 10th, the subpoena until the 10th, for the purpose of immunity, I am instructing him to appear.

Mr. Krieger: We will appear on that when it comes.

Mr. Wall: We are objecting to that continuance.

Mr. Krieger: We are excused now?

Mr. Piazza: Yes.

(1:05 P. M.)

[fol. 53]

IN THE SUPERIOR COURT OF NEW JERSEY

EXCERPTS FROM EXHIBIT "G" TO MOTION OF WATERFRONT COMMISSION (DECISION OF HON. JOSEPH L. SMITH, J. S. C., OCTOBER 4, 1961)

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION—HUDSON COUNTY

Docket Number L-14077-59

IN THE MATTER

of

the Application of the WATERFRONT COMMISSION OF NEW YORK HARBOR to punish WILLIAM MURPHY for failure to obey a Subpoena.

IN THE MATTER

of

the Application of the WATERFRONT COMMISSION OF NEW YORK HARBOR to punish JOHN MOODY, SR., for failure to obey a Subpoena.

Jersey City, N. J.
October 4, 1961.

Before:

HON. JOSEPH L. SMITH, *J. S. C.*

APPEARANCES:

ROBERT A. PIN, Esq.,
For the Waterfront Commission of New York Harbor.

ROBERT H. WALL, Esq.,
For the Defendant Murphy.

MESSRS. KRIEGER & CHODASH,
By: HAROLD KRIEGER, Esq.
For the Defendant Moody.

[fol. 54] The Court: The Court has heard the argument on the question now presented to the Court as to whether or not these defendants have purged themselves of the contempt on which they have previously been found guilty.

This Court is satisfied that they have purged themselves of that contempt. They have obeyed the subpoena, appeared for examination, they have been examined by the Commission, and the record of the transcript of the testimony, as read to this Court, which is a part of this record, indicates that their refusal to answer was recognized as a proper ground and legal basis for their so refusing to answer those particular questions, as the record then stood, namely, on the basis of their constitutional right that it might tend to incriminate them. The Examiner so states many, many times in the record that has been presented to me. The fine has been paid.

I find that the subpoena is still effective. The subpoena, itself, is still effective. It has been adjourned. The subpoena, itself, is returnable—adjourned until October 10th. That is still a date that they must appear, and counsel agrees on the record that they will appear. Mr. Krieger says that they will appear when it comes, referring to October 10th.

Mr. Wall, do you so agree, too?

* * * * * * *

Mr. Wall: Yes, sir.

The Court: So they will appear in answer to that subpoena. What is done then under this statute of immunity is entirely separate and apart from what this Court and the appellate courts have already passed upon. It is not a part of this proceeding and, therefore, an order may be presented accordingly. Show it to your adversary.

* * * * * * *

[fol. 55]

IN THE SUPERIOR COURT OF NEW JERSEY

EXHIBIT "H" TO MOTION OF WATERFRONT COMMISSION (ORDER OF HON. JOSEPH L. SMITH, J. S. C., OCTOBER 4, 1961)

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION—HUDSON COUNTY

Docket No. L-14078-59

IN THE MATTER

of

the Application of the WATERFRONT COMMISSION OF NEW YORK HARBOR,

Plaintiff,

versus

WILLIAM MURPHY and JOHN MOODY,

Defendants.

This matter coming on before the Court in the presence of counsel for the Waterfront Commission and counsel for the defendants, and it appearing to the Court that on the 3rd day of October 1961 the said defendants, namely William Murphy and John Moody appeared before the Waterfront Commission in response to the subpoena issued by the Waterfront Commission and pursuant to the order of this Court, and did comply with the order of this Court and have purged themselves of contempt.

[fol. 56] It is on this 4th day of October, 1961 ordered that the Warrant for arrest heretofore issued by this Court be and the same is hereby withdrawn and for nothing holden.

And this Court further finds and determines that the said defendants have purged themselves of contempt and the sentence confining the said defendants to a penal institu[illegible]n is hereby vacated and set aside and for nothing holden.

The defendants will appear on the adjourned date of the subpoena which is hereby made a part of this order.

JOSEPH L. SMITH,
J. S. C.

Consented as to form:

ROBERT A. PIN,
ROBERT H. WALL,
HAROLD KRIEGER.

[fol. 57]

IN THE SUPERIOR COURT OF NEW JERSEY

EXCERPTS FROM EXHIBIT "I" TO MOTION OF WATERFRONT COMMISSION (TESTIMONY OF WILLIAM MURPHY BEFORE "DESIGNEES" OF WATERFRONT COMMISSION, OCTOBER 27, 1961)

COMMISSION MEETING

RE: WILLIAM MURPHY

15 Park Row,
New York, New York.

October 27, 1961,
5:45 P.M.

Acting Commissioners:

MYLES J. AMBROSE, Executive Director.

WILLIAM P. SIRIGNANO, Esq., General Counsel.

Appearances:

For the Commission:

ANTHONY L. PIAZZA, Esq., Assistant Counsel.

ROBERT A. PIN, Esq., Assistant Counsel.

Witness:

WILLIAM MURPHY, 218 Roosevelt Avenue, Union City, New Jersey.

Attorneys for Witness:

HAROLD KRIEGER, Esq., 921 Bergen Avenue, Jersey City, New Jersey.

ROBERT WALL, Esq., 880 Bergen Avenue, Jersey City, New Jersey.

Present:

George A. Merrill, Jr., Assistant to the Executive Director.

Irving Malchman, Esq., Assistant to the General Counsel.

[fol. 58] Mr. Ambrose: This is a regular scheduled meeting of the Waterfront Commission of New York Harbor, with Mr. Sirignano being designated as Deputy to Commissioner Thompson of the State of New Jersey, and myself being designated as Deputy to Commissioner Tyler of the State of New York.

The purpose of this meeting is to inquire into violations of the Compact in connection with a work stoppage in May, 1960, at the American Export Line piers in Hoboken, New Jersey.

* * * * * * *

Mr. Piazza: Before I call Mr. Murphy to the stand, I would like to introduce into evidence the certified copies of the designations.

Have these marked.

(Designation authorizing Myles J. Ambrose to act in the place of Commissioner Harold R. Tyler, Jr., to confer immunity upon William Murphy marked Commission Exhibit 1 for identification.)

(Designation authorizing Myles J. Ambrose to act in place of Commissioner Harold R. Tyler, Jr., to confer immunity upon John Moody, Sr., marked Commission Exhibit Number 2 for identification.)

(Designation authorizing William P. Sirignano to act in the place of Commissioner David C. Thompson, to confer immunity upon William Murphy marked Commission Exhibit 3 for identification.)

(Designation authorizing William P. Sirignano to act in the place of Commissioner David C. Thompson, to confer immunity upon John Moody, Sr., marked Commission Exhibit 4 for identification.)

Mr. Piazza: I would also like to introduce the letters of notice pursuant to the statute which was sent to the ap-

[fol. 59] propriate Attorney Generals and District Attorneys of the States of New York and New Jersey.

(Letter dated October 10, 1961, to Honorable Lawrence A. Whipple, together with certification of service by mail; letter dated October 10, 1961, to Honorable David D. Furman, together with certification of service by mail; letter dated October 23, 1961, to Honorable Frank Hogan, together with certification of service by mail and letter dated October 24, 1961, to Honorable Louis Lefkowitz, together with certification of service by mail marked Commission Exhibit 5 for identification.)

* * * * * * *

[fol. 61] Mr. Krieger: * * * Under those circumstances, I call upon counsel to produce the original, or a certified copy of an order for a public hearing, and the purposes of such a public hearing so that we may have a proper record thereon. I desire that in that record, if there is such a record, there be stated in such a record the purpose and pertinency of this public hearing, the purpose of it, and in detail the specific charges, if any; the names of witnesses to support such charges; and confrontation of such witnesses to my client who appears here in this room. Otherwise, might I say this: It is our contention, at this time, that there is an entire denial of due process of law and right of fair hearing at this public hearing—or if you want to call it a trial. We don't know which it is at this point. It may be either one, or the other. I'd like to point out to this Commission that it now has become an accusatory agency, under the statute, and it expressly claims a right of such a function to deal with the commission of crimes by individuals. This makes this Commission, as presently constituted in [fol. 62] this hearing, a combination of a grand jury body and punitive tribunal and, therefore, we request that it be stated fully as a matter of record the purpose or pertinency and a full apprisal necessary, otherwise we are unable to properly advise our clients as to their constitutional rights and other rights they may have by reason of the statutes of such cases made and provided. It is also the question of proper due process of law. We are placed at a serious disadvantage, both from a legal viewpoint, and the client from a legal and social viewpoint; and I am waiting now for the Commission's furnishing a determination by the Waterfront Commission of its purpose for holding of a public hearing and setting it forth fully for the purpose of the record.

Mr. Sirignano: Mr. Krieger, so we get the record in the proper perspective, it was merely stated at the outset that this is an investigation, and this investigation is being held in a public session. From that, you conclude this is a public hearing? That it is a trial? That there are charges and there are accusations? There are no such things. Your clients, Mr. Murphy and Mr. Moody appear here as witnesses in an investigation pursuant to a subpoena. Now, do you have such a subpoena, Mr. Piazza?

Mr. Piazza: The subpoena is in the court record.

Mr. Sirignano: And this is the adjournment date of that particular subpoena?

Mr. Piazza: Yes.

Mr. Sirignano: And this is the continuation of the investigation that was started sometime before; is that correct, Mr. Piazza?

Mr. Piazza: Yes, sir.

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[fol. 63] Mr. Krieger: I asked for counsel to produce—and that is where you asked Mr. Wall if he had anything further—for the order of the Commission setting up the purposes and pertinency of this investigation, and we are entitled to have that under the case of Watkins v. United States, and all the other cases in which pertinency and the Commission's object thereof must be fully set forth and a determination made. We have nothing like that before us at all. We don't know the extent and we haven't the yardstick and how far this can go.

Mr. Sirignano: Mr. Krieger, this investigation, as you well know, being personally involved as counsel for the client herein, has a background of a year and a half. It has been litigated in all those courts. The court has found, in connection with this particular investigation, your clients were properly and fully advised as to the nature of this investigation.

Mr. Krieger: I disagree with you. The court never made such a finding in that respect because that point was never raised.

[fol. 64] Mr. Sirignano: We will proceed with the investigation.

Mr. Krieger: That point was never raised and that issue is still before the United States Supreme Court and not determined by them.

Mr. Wall: Pardon me just a moment, I have one more request.

Mr. Sirignano: Yes.

Mr. Wall: Can I note on the record your position with the Waterfront Commission? Are you General Counsel?

Mr. Sirignano: Yes, I am.

Mr. Wall: Mr. Sirignano is General Counsel.

May I, Mr. Ambrose, ask what your position is with the Waterfront Commission.

Mr. Ambrose: Executive Director.

* * * * * * *

Mr. Krieger: Mr. Sirignano, I made a demand for an instrument, that is always in an instrument form, where it is determined whether it be a Senate Investigation Committee, whether it be a grand jury or whether it be any other investigative body with authority to investigate, before an investigation could take place by any body there must be a determination of purpose; there must be a determination made, purposes and objects set forth therein so there would be the yardstick and limitation. Our courts have said that consistently. I have asked for all that and have not as yet received it.

Mr. Sirignano: Mr. Krieger, I think I have answered that question for the record and if you did not understand, I will do so again. This is the same investigation that was involved in litigation which went up from the Superior Court to the Appellate Division of the Supreme Court of the State of New Jersey. That investigation is now continuing and the Commissioners have designated Mr. Ambrose and myself to sit in their stead for the purpose of this investigation.

Mr. Krieger: I don't know what that means, Mr. Sirignano. That's the trouble with this investigation.

[fol. 65] Mr. Piazza: Pursuant to the statute.

Mr. Krieger: Are you going to submit such an instrument? Is there such an instrument in being or existence? Is there anything like that? I am asking that question of you.

Mr. Ambrose: I think we have ruled that the purposes of this investigation are clearly shown to both you and to your clients—

Mr. Krieger: No, they're not.

Mr. Ambrose: —to all concerned and, certainly, it is to the Commission and we will note your objection and we will proceed.

Mr. Krieger: Maybe I haven't made myself clear.

Mr. Ambrose: I think you made yourself clear.

Mr. Krieger: If you understand me, I asked is there such an order of determination made by the Waterfront Commission for such an investigation which sets forth objects and purposes. There either exists one or doesn't exist. If there isn't one, the Commission could have it clearly stated for the record so there is no question about it.

Mr. Ambrose: I don't think we have to answer the question under the circumstances.

Mr. Krieger: If you don't want to answer, that is your prerogative.

Mr. Ambrose: We will proceed, unless you have any other objections.

Mr. Krieger: Do I understand there is not or you will not answer?

Mr. Ambrose: I said your objections are noted for the record.

Mr. Krieger: It's not an objection, it's a request.

Mr. Ambrose: Your request is also noted for the record. I think it is satisfactorily answered by Mr. Sirignano, and now will you proceed.

Mr. Krieger: Let me indicate this: that I have asked for, arbitrary disposition made of it, no answer given as to [fol. 66] whether or not such an order exists by the Commission; no answer as to whether or not there is an order available. There has been a refusal to produce one, and let the record so indicate. That's all.

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[fol. 68] Mr. Krieger: That question was determined by the court insofar as the preemption; by the preemption. The question I raised so far as pertinency and purposes was never set forth, was never argued properly. The record was never clear thereon. Was there a demand made to order at that time? None of those questions appeared on the record. None of those questions were properly argued. None of these questions appeared for the purpose of a determination by the Federal Court.

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[fol. 69] Mr. Ambrose: Do you have something else, Mr. Piazza?

Mr. Piazza: Yes. I'd like to proceed to October 10, 1961. A letter was addressed to the Honorable Lawrence A. Whipple, Prosecutor of Hudson County, Hudson County Court, Jersey City 6, New Jersey, wherein notice was given of this proceeding as required by our statute.

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Mr. Piazza: On October 10, 1961, the letter was addressed to the Honorable David D. Furman, Attorney General, State of New Jersey, Trenton, New Jersey, informing him of this proceeding.

Mr. Wall: The same letters?

Mr. Piazza: Practically the same letters.

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[fol. 70] Mr. Piazza: October 23, 1961, a similar letter was sent to the Honorable Frank Hogan, District Attorney of New York County, New York, informing him of this proceeding.

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Mr. Krieger: And I also make the same objections insofar as the letters themselves are concerned.

Mr. Ambrose: Your objections are noted. Proceed, Mr. Piazza, please.

Mr. Piazza: On October 24, 1961, a similar letter was sent to the Honorable Louis Lefkowitz, Attorney General, State of New York, Albany, New York, informing him of this proceeding.

Mr. Krieger: I make the same objection without repeating it in detail.

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Mr. Ambrose: I take it then, these are three letters, three acknowledgments, one from Frank S. Hogan, District At- [fol. 71] torney of the County of New York, State of New York; one from David D. Furman, Attorney General of the State of New Jersey; and one from Louis J. Lefkowitz, Attorney General of the State of New York, the only known acknowledgments at this point?

Mr. Piazza: Mr. Whipple.

Mr. Ambrose: What position?

Mr. Piazza: Prosecutor of Hudson County.

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(Commission Exhibits 6, 7 and 8 for identification received and marked in evidence.)

Mr. Krieger: Note for the record that would be the only one that would have jurisdiction of the subject matter, in view of the statement made by Mr. Piazza. Hoboken, New Jersey is within the County of Hudson, State of New Jersey.

Mr. Ambrose: Your statement of law is noted for the record.

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Mr. Piazza: This investigation concerns a work stoppage that occurred on the morning of May 16, 1960, at the Hoboken Terminal of the American Export Lines, Piers A, B and C, in Hoboken. And we are here to discover whether there are any violations of the Compact.

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William Murphy, residing at 218 Roosevelt Street, Union City, New Jersey, appearing as a witness, having been previously sworn, testified further as follows:

By Mr. Piazza:

Q. Would you give your name and address, sir.

A. William Murphy, 218 Roosevelt Street, Union City, New Jersey.

Q. Are you an official of the ILA, Independent?

A. On the advice of counsel I stand on my constitutional rights.

[fol. 72] Mr. Krieger: I might say this for the purpose of the record, so there can be no question about this: I have heretofore asked for purpose and pertinency; I have heretofore asked for details and such. I respectfully contended that there has been a denial of due process of law. I respectfully contend that the Waterfront Commission, by refusing to give us full appraisal from which we would be able to determine rationally whether we need or whether this witness needs to invoke the privilege of self-incrimination, is forcing this witness and forcing counsel to suggest to the witness, so far as advice is concerned and his rights are concerned, to invoke a privilege in the dark and is forcing him to incur any disadvantages as a result of taking such constitutional rights as guaranteed to him because of his denial of due process of law. We respectfully contend that his requiring to take the constitutional privileges as guaranteed by the United States Constitution in the Statutes of the State of New Jersey is done under protest, protest being once again that such invoking of the privilege has come about as a result of the Commission's denial of due process of law. And I might repeat, the self-incrimination privilege is invoked under express protest, the protest being based upon the due process clause of the 14th and Fifth Amendments of the United States Constitution, as well as the Constitution of the State of New Jersey and the statutes in such cases as may be provided.

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Mr. Ambrose: Mr. Krieger, would you mind waiting a minute, please.

Are you objecting to the answering of this question on the ground that any answer might possibly tend to incriminate you, Mr. Murphy.

[fol. 73] Mr. Murphy: I am refusing to answer on advice of counsel, that it may tend to incriminate me.

Mr. Piazza: Your Honors, I therefore respectfully request that this witness be given immunity and that he be directed to answer.

Mr. Ambrose: May I interrupt one second.

Mr. Murphy, will you continue to refuse to answer questions on the grounds of possible self-incrimination?

Mr. Krieger: Just a minute. That's an unfair question.

Mr. Ambrose: We will proceed.

Mr. Sirignano: Mr. Piazza, let's take this one step at a time, please.

Will you kindly read for the benefit of the witness, the statute which confers immunity and the manner in which it is conferred.

Mr. Piazza: All right, sir. In addition to the powers and duties elsewhere prescribed in this Compact, the Commission shall have the power to confer immunity in the following manner: In any investigation, interview or other proceeding conducted under oath by the Commission or any duly authorized officer, employee or agent thereof, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and notwithstanding such refusal, an order is made upon 24 hours' prior written notice to the appropriate Attorney General of the State of New York or the State of New Jersey, and to the appropriate District Attorney or prosecutor having an official interest therein, by the unanimous vote of both members of the Commission or their designees appointed pursuant to the provisions of Section 3 of Article III of this Act, that such a person answer the question or produce the evidence, such person [fol. 74] shall comply with the order. If such person complies with the order, and if, but for this subdivision, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him.

Mr. Sirignano: Mr. Murphy, Mr. Piazza has just read the statute which authorizes the Commission to grant immunity. Now, what that means in plain language is this: that you, as a witness, if a question is asked of you and you honestly believe the answer may incriminate you, you may plead that privilege and you do not have to answer the question; except that where the Commission orders you and directs you to answer that question, you must answer it. And you get this benefit from that direction: that any transaction concerning which you testify, you will be held immune from that and any answer you may give or evidence that you produce, cannot be used against you. Do you understand that?

Mr. Murphy: Yes.

Mr. Sirignano: That if you fail to answer after that direction you may be subjected to contempt, or if you answer truthfully you may be subjected to prosecution for perjury. Do you understand that?

* * * * * * *

Mr. Krieger: Do you represent, Mr. Sirignano, this witness sitting in the witness box that he cannot be subjected to any criminal proceedings of any kind and nature from either the State of New York or the State of New Jersey or by the Federal Government of the United States of America by reason of any answers that he may give after you give the so-called immunity that you speak about, that you make such a representation to this witness?

Mr. Sirignano: I make this representation, Mr. Krieger: [fol. 75] that any transaction concerning which he testifies or any evidence he gives or produces will not be used against him and he cannot be prosecuted for such transaction by the States of New York and New Jersey.

Mr. Krieger: Mr. Sirignano, do you make a representation to this witness that any testimony that he may give after this grant of so-called immunity that you say you possess to give, that his answers may not tend to incriminate him in the giving or getting of certain other evidence that could connect him with any other criminal offense?

Mr. Sirignano: I think—

Mr. Krieger: I now cite the case for your information—

Mr. Sirignano: I think I answered that when I said, to any transaction concerning which he testified, he will be immune from prosecution.

Mr. Krieger: When you say transaction, are you now referring specifically that this witness cannot be prosecuted as a result of a so-called work stoppage that took place in 1960 on the piers of the City of Hoboken, County of Hudson and State of New Jersey?

Mr. Sirignano: That's correct, sir.

Mr. Krieger: You make a representation to this witness that he cannot be prosecuted by the Federal Government?

Mr. Sirignano: I did not because no such representation can be made in giving immunity.

Mr. Krieger: You make no such representation?

Mr. Sirignano: Not by the Federal Government.

Mr. Krieger: Then we all understand each other.

Now, I ask Mr. Sirignano, under the statute have you such an order that you are now issuing, a written order on the question that was propounded to the witness?

Mr. Sirignano: We haven't given any order yet, Mr. Krieger.

[fol. 76] Mr. Piazza: The question that was pending, Your Honors, was whether this witness was an official of the ILA, I understand, to which he pleaded the Fifth Amendment, and I respectfully request that he be directed to answer.

Mr. Krieger: If Your Honor please, there is no statement that I have heretofore requested as to pertinency of the question of representation.

Mr. Ambrose: I think that objection has been carefully noted in the record.

Mr. Krieger: You think so and I hope that the Court will think so.

Mr. Ambrose: The record is clear here and carefully noted and we all noted it.

Mr. Krieger: I hope the court will say it was noted. This is going to come to the courts. We might just as well understand each other now, not that we want to be antagonistic. There are very novel questions involved here. And we have attempted, very much so, and we have attempted by a motion that is returnable next Friday to have these issues as far as the constitutionality of this statute determined, so that there can be no question about our desire to cooperate.

Mr. Ambrose: Proceed, Mr. Piazza.

Mr. Piazza: I respectfully request that the witness be directed to answer.

Mr. Sirignano: Mr. Murphy, you are directed to answer the question.

Mr. Krieger: For the purpose of the record, I respectfully contend that the Commission, as presently constituted has no legal authority to grant any immunity, properly immunize, this witness against prosecution either in the State of New Jersey or by the Federal Government.

Mr. Ambrose: You are directed to answer.

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[fol. 77] Mr. Ambrose: If there is a question of the state of the record, I am directing Mr. Murphy to answer this question.

(Reporter read back.)

Mr. Krieger: Now, for the purpose of this record, is that what you mean by constituting immunity?

Mr. Ambrose: For the purpose of the record, I will redirect Mr. Murphy to answer the question.

Mr. Krieger: And that constitutes immunity granted to him?

Mr. Ambrose: That is correct.

Mr. Krieger: And that he answer the question in that manner? I respectfully request that that does not constitute immunity.

Mr. Ambrose: You are directed to answer the question, Mr. Murphy.

Mr. Piazza: Mr. Murphy, you will have to give an answer.

A. On advice of counsel I stand on my constitutional rights.

Mr. Ambrose: You decline to answer on the grounds of possible self-incrimination on advice of your counsel?

Mr. Murphy: On advice of counsel I refuse to answer.

Mr. Ambrose: You refuse to answer, or, are you—

Mr. Murphy: On my constitutional rights.

Mr. Ambrose: Do you mean by that, Mr. Murphy, you decline to answer because of possible self-incrimination?

Mr. Murphy: I refuse and stand on my constitutional right.

Mr. Sirignano: Notwithstanding the fact that you are ordered to answer the question?

Mr. Murphy: I stand on my constitutional rights.

[fol. 78] Mr. Ambrose: And that you were granted immunity?

Mr. Krieger: I object to that. That's a conclusion. You can't have him determine whether or not he was granted immunity.

Mr. Ambrose: Your objection is noted, Mr. Krieger.

Mr. Ambrose: Would you proceed, Mr. Piazza.

Q. I direct your attention to a work stoppage that occurred on Monday, May 16, 1960, at Piers A, B, C, Hoboken, the American Export Lines Terminal. Did you have any prior knowledge that a work stoppage would occur Monday, May 16, 1960, at the said terminal?

Mr. Krieger: Again, for the purpose of the record, I am going to do this and I assume the record will indicate and it won't be necessary to do it for each question. I have heretofore asked for pertinency, object; I have also indicated pertinency and there's been a denial to set therein the relevancy.

Mr. Ambrose: Do you have any new objection, Mr. Krieger, or is this the same one you made a dozen times?

Mr. Krieger: I just want to clear it and I will say it now so I won't have to do it again, and you people understand that it's so and you note that it's specifically urged for each one of the questions without the necessity of repeating each time.

Mr. Sirignano: That is understood and there is a—

Mr. Krieger: And there has been a contention of Mr.

Wall and myself of a denial of due process of law to the individual.

Mr. Sirignano: It is understood, Mr. Krieger, that you are making a blanket objection to the jurisdiction of this [fol. 79] Commission to carry on this investigation. It is noted as a blanket objection.

Mr. Krieger: No.

Mr. Ambrose: All your specific objections?

Mr. Krieger: Yes.

Mr. Sirignano: Except the claiming of self-incrimination, we want that individually as to each question.

Mr. Krieger: As far as each witness is concerned, that witness has the alternative to turn the privilege because of the denial of due process of law; he has not been made aware completely of the objects and pertinency of the question and therefore he has been compelled to invoke the constitutional privileges of self-incrimination, because of the denial of due process of law.

Mr. Ambrose: It will be noted.

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Q. Mr. Murphy, I direct your attention to a work stoppage that occurred on Monday, May 16, 1960, at Piers A, B and C, Hoboken, the American Export Lines Terminal. Did you have any prior knowledge that a work stoppage would occur at the said terminal on Monday, May 16, 1960?

A. On advice of counsel, I stand on my constitutional rights.

Mr. Ambrose: You are declining to answer on the grounds of possible self-incrimination, Mr. Murphy?

Mr. Murphy: I stand on my constitutional rights.

Mr. Ambrose: You are directed to answer, Mr. Murphy.

Mr. Murphy: I stand on my constitutional rights.

Mr. Ambrose: You are declining to answer on the grounds of possible self-incrimination?

Mr. Murphy: I do.

Mr. Ambrose: Proceed, Mr. Piazza.

Q. Mr. Murphy, when did you first hear that a work stop- [fol. 80] page was in progress at Piers A, B and C, Hoboken? And I am referring to the May 16, 1960 work stoppage?

Mr. Krieger: It's understood, as you said before, that my objection goes without repeating.

Mr. Ambrose: Yes, as you have said before.

Mr. Murphy: On advice of counsel I stand on my constitutional rights.

Mr. Piazza: I respectfully request that he be directed to answer.

Mr. Sirignano: Mr. Murphy, Mr. Ambrose and myself have conferred and we unanimously agree that you be ordered to answer the question. You are hereby ordered to answer the question.

Will you answer the question, please.

Mr. Murphy: On the advice of counsel I stand—

Mr. Sirignano: You persist in your refusal?

Mr. Krieger: I object to the witness being pressed. The witness has already answered.

Mr. Sirignano: Continue.

Q. Mr. Murphy, who were the persons that gave you the information about the work stoppage on May 16th, 1960 at the Hoboken Terminal of the American Export Line?

A. On advice of counsel I stand on my constitutional rights.

Mr. Sirignano: Mr. Murphy, Mr. Ambrose and myself have conferred and you are hereby ordered to answer the question.

Mr. Murphy: On the advice of counsel I stand on my constitutional rights.

Q. Mr. Murphy, did you, at any time, give orders to longshoremen or others such as shop stewards, that a work stoppage was to take place on May 16th, 1960 at the American Export Line Terminal in Hoboken?

A. On advice of counsel I stand on my constitutional rights.

[fol. 81] Mr. Sirignano: Mr. Murphy, Mr. Ambrose and I have decided to order you to testify in answer to the question. You are hereby ordered to answer the question.

Mr. Murphy: On the advice of counsel I stand on my constitutional rights.

Mr. Krieger: I might say this for the purpose of the record so that there will be no misunderstanding: of course, Mr. Murphy, is a layman and not a lawyer. When we use constitutional rights, of course, we all understand that he means the 14th Provision of the Constitution of the United States, the 5th Amendment of the United States Constitution and also the statutory rights.

Mr. Sirignano: And also the Constitution of the States of New York and New Jersey.

Mr. Krieger: New Jersey particularly.

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Q. Mr. Murphy, do you know whether the work stoppage that took place on May 16th, 1960 at the American Export Line Terminal was related to the presence of one James Markley on the piers as a security officer?

A. On the advice of counsel I stand on my constitutional rights.

Mr. Piazza: I respectfully request he be directed to answer.

Mr. Sirignano: Mr. Murphy, you are hereby ordered to answer by Mr. Ambrose and myself.

Mr. Murphy: On the advice of counsel I stand on my constitutional rights.

Q. Mr. Murphy, did you have any conversations with any union officials of the I.L.A. prior to May 16, 1960 about the presence of James Markley on the Hoboken Terminal as a security officer?

A. On the advice of counsel I stand on my constitutional rights.

[fol. 82] Mr. Piazza: I respectfully request he be directed to answer.

Mr. Sirignano: You are hereby ordered, Mr. Murphy, by Mr. Ambrose and myself to answer the question.

Mr. Murphy: On the advice of counsel I stand on my constitutional rights.

Mr. Krieger: Again, for the purpose of the record so that he may not be misunderstood, the witness sitting in the box, he is a layman and when he uses the constitutional rights he refers to the 14th Amendment and the 5th Amendment of the United States Constitution, Constitution of the State of New Jersey and also the lack of power and immunity heretofore indicated and which is not indicated in the instance.

Mr. Ambrose: Yes, I think you mentioned that before and it's on the record, Mr. Krieger.

Q. On May 16th, 1960, did you, Mr. Murphy, have a conversation with one Leland Andrews concerning this work stoppage that took place on May 16th, 1960 at the American Export Line Pier?

Mr. Sirignano: Can you fix the place?

Mr. Piazza: At the Hotel Meyer in Hoboken.

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A. On the advice of counsel I stand on my constitutional rights.

Mr. Piazza: I respectfully request he be directed to answer.

Mr. Sirignano: You are hereby ordered by Mr. Ambrose and myself to answer the question, Mr. Murphy.

Mr. Murphy: On the advice of counsel I stand on my constitutional rights.

[fol. 83] Q. Did you, in the conversation with Mr. Andrews on the 16th of May, 1960, reach any agreement over the presence of Mr. Markley on the Hoboken Terminal of the American Export Lines in Hoboken?

A. On the advice of counsel I stand on my constitutional rights.

Mr. Piazza: I respectfully request he be directed to answer.

Mr. Sirignano: You are directed to answer by Mr. Ambrose and myself.

Mr. Murphy: On the advice of counsel I stand on my constitutional rights.

Q. Mr. Murphy, on the morning of the 17th of May, 1960 were you on the American Export Line Hoboken Terminal?

A. On advice of counsel I stand on my constitutional rights.

Mr. Piazza: I respectfully request he be directed to answer.

Mr. Ambrose: Mr. Murphy, you are directed after conference between Mr. Sirignano and myself to answer the question.

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Q. Mr. Murphy, on May 17th, 1960 at the Hoboken Terminal of the American Export Line did you have a conversation with one Michael McNamara?

A. On the advice of counsel I stand on my constitutional rights.

Mr. Ambrose: The Commission directs you to answer.

Mr. Murphy: On the advice of counsel I stand on my constitutional rights.

Q. Mr. Murphy, on the morning of May 17th, 1960 at the American Export Line Terminal in Hoboken did you have a conversation with one Frank Rump?

A. On advice of counsel I stand on my constitutional rights.

[fol. 84] Mr. Piazza: I respectfully request he be directed to answer.

Mr. Sirignano: The Commission orders you to answer that question, Mr. Murphy.

Mr. Murphy: On the advice of counsel I stand on my constitutional rights.

Q. Mr. Murphy, on the morning of May 17th, 1960 did you have a conversation with one Carmine Bruno?

A. On advice of counsel I stand on my constitutional rights.

Mr. Piazza: I respectfully request that he be directed to answer.

Mr. Sirignano: The Commission orders you to answer the question, Mr. Murphy.

Mr. Murphy: On the advice of counsel I stand on my constitutional rights.

Q. Mr. Murphy, on the morning of May 17th, 1960 at the Hoboken Terminal did you have a conversation with one Eric Lempke?

A. On the advice of counsel I stand on my constitutional rights.

Mr. Piazza: I respectfully request he is directed to answer.

Mr. Ambrose: The Commission directs you to answer the question.

Mr. Murphy: On the advice of counsel I stand on my constitutional rights.

Mr. Krieger: May I now ask Counsel this question, whether or not he's gone further in his scope in questions than were asked heretofore on matters that were heretofore submitted to the court of the State of New Jersey?

Mr. Piazza: Your Honor, I don't consider—

Mr. Sirignano: I think that's irrelevant as to the proceeding, Mr. Krieger.

[fol. 85] Q. Mr. Murphy, on the morning of the 17th of May, 1960 did you have a meeting with officials of the American Export Line at the Hoboken Terminal of the American Export Line?

A. On advice of counsel I stand on my constitutional rights.

Mr. Ambrose: The Commission directs you to answer.

Mr. Murphy: On the advice of counsel I stand on my constitutional rights.

Q. Did you, at that time, reach any agreement concerning the presence of Mr. Markley on the Hoboken Terminal as a security officer?

Mr. Krieger: Wait a minute. Just a minute. For the purpose of the record, I want to object for an additional ground now. It apparently appears that we are referring to an individual who evidently was an employee, and that appears as a matter of record at the Waterfront Commission of the American Export Lines. It apparently appears further that there may be some question as to whether or not there's a violation of a federal statute in that respect. Or, in some respect, and therefore, the Commission is without jurisdiction, as a matter of law.

Mr. Sirignano: Proceed.

Mr. Piazza: I respectfully request he be directed to answer.

Mr. Sirignano: The Commission orders you to answer the question, Mr. Murphy.

Mr. Murphy: What was the question—on the advice of counsel I stand on my constitutional rights.

Mr. Ambrose: And you've been directed to answer that by the Commission.

Mr. Murphy: On the advice of counsel I stand on my constitutional rights.

Mr. Sirignano: Mr. Murphy, I would like to ask you a [fol. 86] question. Did you ever make any demand from any official of the American Export Line to fire Mr. Markley before the men went back to work?

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Mr. Murphy: On the advice of counsel I stand on my constitutional rights.

Mr. Ambrose: The Chairman directs you to answer, Mr. Murphy.

Mr. Murphy: On the advice of counsel I stand on my constitutional rights.

Mr. Sirignano: Did you tell any official of the American Export Lines that the men would not go back to work until Mr. Markley was kept off the piers?

Mr. Murphy: On advice of counsel I stand on my constitutional rights.

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Mr. Ambrose: You are directed to answer.

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Q. Mr. Murphy, did you have a meeting with the Executive Vice President of American Export Line at the offices of the American Export Line at 39 Broadway in New York City in August, 1960?

A. On the advice of counsel I stand on my constitutional rights.

Mr. Piazza: I respectfully request he be directed to answer.

Mr. Sirignano: Is that August date a correct date?

Mr. Piazza: August, 1960.

Mr. Wall: I'll object. That's immaterial, too far afield from the point of issue. You are talking about something about May 19th, and now you are in August. I say it's immaterial.

Mr. Ambrose: Your objection is noted.

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[fol. 87] Mr. Ambrose: Is that in relation to this May, 1960 strike?

Mr. Piazza: Yes. The question is directed to the presence of Mr. Markley on the piers.

Mr. Sirignano: I'll allow the question.

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Mr. Murphy: I refuse to answer on the advice of counsel and I stand on my constitutional rights.

Mr. Ambrose: You are directed to answer by the Commission, Mr. Murphy.

Mr. Murphy: On the advice of counsel I stand on my constitutional rights.

Q. Mr. Murphy, did you, at that meeting with the Executive Vice President of the American Export Line, state that if Mr. James Markley walked on the piers A, B, and C in Hoboken there would be a strike?

Mr. Wall: What date was that?

Mr. Piazza: In August, 1960. It's already in the record.

A. On the advice of counsel I stand on my constitutional rights.

Mr. Piazza: I respectfully request he be directed to answer.

Mr. Sirignano: The Commission orders you to answer that question, Mr. Murphy.

Mr. Murphy: On the advice of counsel I stand on my constitutional rights.

Mr. Ambrose: Just a minute, Mr. Counsel.

May I ask a few questions at this point, Mr. Counselor.

Did you, Mr. Murphy, ever discuss or give any orders to any shop stewards or officials of your local to pull the [fol. 88] men out on Piers A, B and C in the event Mr. Markley walked onto the piers in May of 1960 in the performance of his duty as a security officer for the American Export Lines?

Mr. Murphy: On advice of counsel I stand on my constitutional rights.

Mr. Ambrose: The Commission directs you to answer the question, Mr. Murphy.

Mr. Murphy: On advice of counsel I stand on my constitutional rights.

Mr. Ambrose: Mr. Murphy, do you know now whether Mr. Markley has ever, since May, 1960, walked on the piers in Hoboken, New Jersey of the American Export Lines in connection with his duties as a security officer for that company?

Mr. Murphy: On the advice of counsel I stand on my constitutional rights.

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Mr. Ambrose: You are ordered to answer my last question.

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Mr. Murphy: On the advice of counsel I stand on my constitutional rights.

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Mr. Wall: Maybe I can clarify this, Mr. Sirignano. What we want to know is simply this: Was Mr. Markley an employee of the Bi-State Waterfront Commission on May 19th, 1960 or by whom was he employed? That's all we want to know.

Mr. Piazza: On May 19th, 1960 he was an employee of the American Export Lines.

Mr. Wall: Have you got any records to show that?

Mr. Ambrose: No. I think that at this point we ought to [fol. 89] also state for the record that Mr. Markley was previously employed at one time by this Commission. Now, I think we ought to see if the witness is aware of this.

Mr. Murphy, do you know if Mr. Markley was at any time employed by this Commission in any capacity whatsoever?

Mr. Murphy: On the advice of counsel I stand on my constitutional rights.

Mr. Ambrose: You are ordered to answer by the Commission, Mr. Murphy.

Mr. Murphy: On advice of counsel I stand on my constitutional rights.

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Q. Mr. Murphy, is it not true that the statement you made to the Vice President of the American Export Line in August, 1960 that if Mr. Markley steps on the Hoboken Terminal there would be a strike, is still in force today and that Mr. Markley cannot step on the pier today in pursuance of his duties as a security officer?

Mr. Wall: Now, I object to the form of the question. The question has already been answered. It's repetitious and this statement is alleged to have been made in August, 1960, some date in August. It's immaterial, irrelevant and it's too far away from May 19, 1960 to be in anywise relevant to this issue.

Mr. Sirignano: Would you break your questions down into two questions; Mr. Piazza,

Mr. Piazza: As to whether he had such a conversation.

Q. Mr. Murphy, did you, in August, 1960, tell the Executive Vice President of the American Export Line that if Mr. Markley stepped on the piers there would be a walkout?

[fol. 90] Mr. Ambrose: Your objection is renewed, Mr. Wall?

Mr. Wall: Yes, sir.

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Mr. Krieger: For the purpose of the record, I want to object on the ground of pertinency, purpose. I want to object also on the further ground that there's no further description of an individual given or a confrontation, probably.

Mr. Piazza: I respectfully request that he be directed to answer.

Mr. Ambrose: He hasn't refused yet.

Mr. Murphy: On the advice of counsel I stand on my constitutional rights.

Mr. Ambrose: You are directed by the Commission to answer the questions.

Mr. Murphy: On the advice of counsel I stand on my constitutional rights.

Mr. Ambrose: May I ask a question, please.

In the event that Mr. Markley walked on the piers of Hoboken, New Jersey today on the American Export Lines would you order the membership of the I.L.A. present there off the piers?

Mr. Krieger: Just a minute, Mr. Murphy. I think that's a very unfair question, Mr. Ambrose, what he would do. I think again that's the type of a question, Mr. Ambrose, that we described before as beating a witness. I think that that goes beyond the scope of investigation. It only tends to exhibit an unfairness that I have heretofore described. It's surely a denial of due process of law, it's an attempt to hold this witness up to ridicule and I think it's a very unfair question, sir.

Mr. Ambrose: Your objection is noted.

Would you answer the question, please.

[fol. 91] **Mr. Murphy:** On the advice of counsel I stand on my constitutional rights.

Mr. Ambrose: You are directed to answer the question.

Mr. Murphy: On the advice of counsel I stand on my constitutional rights.

Mr. Krieger: Let me further indicate that this does not go to an investigation. You are asking what he would do in the future. That surely is not an investigation as to May of 1960.

Mr. Sirignano: Mr. Piazza, I think that from the pattern that has been established here, that the witness is going to persist in refusing to answer any questions despite a conferral of immunity by the Commission. In that event, do you wish to make a statement now?

Mr. Piazza: Well, then, in the light of that statement I respectfully request that this interview be closed at this time and that the next witness, Mr. Moody be called.

Mr. Sirignano: Mr. Malchman, please.

(Bench conference held.)

Mr. Ambrose: Back on the record.

May the record note that Mr. Irving Malchman, Special Assistant of the General Counsel of the Waterfront Commission of New York Harbor—

* * * * * * *

Mr. Sirignano: Mr. Malchman, the Commission has conferred and you are directed to institute contempt proceedings involving this witness for his persistence in his refusal to answer after he has been granted immunity.

Mr. Ambrose: You are excused, Mr. Murphy.

* * * * * * *

[fol. 92]

IN THE SUPREME COURT OF NEW JERSEY

EXCERPTS FROM EXHIBIT "J" TO MOTION OF WATERFRONT COMMISSION (TESTIMONY OF JOHN MOODY, SR., BEFORE "DESIGNEES" OF WATERFRONT COMMISSION, OCTOBER 27, 1961)

COMMISSION MEETING

Re: John Moody, Sr.

15 Park Row,
New York, New York.

October 27, 1961,
7:30 P. M.

Acting Commissioners:
- Myles J. Ambrose, Executive Director.
- William P. Sirignano, Esq., General Counsel.

Appearances:
For the Commission:
- Anthony L. Piazza, Esq., Assistant Counsel.
- Robert A. Pin, Esq., Assistant Counsel.

Witness:
John Moody, Sr., 1111 Washington Street, Hoboken, New Jersey.

Attorneys for Witness:

Harold Krieger, Esq., 921 Bergen Avenue, Jersey City, New Jersey.

Robert H. Wall, 880 Bergen Avenue, Jersey City, New Jersey.

Present:

George A. Merrill, Jr., Assistant to the Executive Director.

Irving Malchman, Esq., Assistant to the General Counsel.

[fol. 93] (Off the record discussion was held.)

Mr. Sirignano: It is understood then, I take it, Gentlemen, that all the exhibits that were introduced in connection with the questioning, the interrogation of Mr. Murphy, and all the objections raised by counsel in connection with the introduction of these exhibits into the record are made part of the record of the interrogation of Mr. Moody?

Mr. Krieger: And all the statements made as far as Murphy is concerned applies in this instance and is considered for all purpose as one record in both instances, as far as both individuals are concerned.

Mr. Sirignano: And then we will proceed directly to the questioning; is that correct, Mr. Krieger?

Mr. Krieger: And the objections and purposes—

Mr. Wall: All constitutional questions are the same.

Mr. Krieger: As far as the objections in the hearing are concerned, the constitutional questions pursuant to due process that was said before become part of this record in its entirety.

Mr. Sirignano: Any objection, Mr. Piazza?

Mr. Piazza: None.

• • • • • • •

John Moody, Sr., appearing as a witness, having been previously duly sworn, testified further as follows:

By Mr. Piazza:

Q. Mr. Moody, will you give your full name and address, please.

A. John E. Moody, 1111 Washington Street, Hoboken, New Jersey.

Q. Mr. Moody, are you an official of the ILA Independent?

* * * * * * *

Mr. Krieger: For the purpose of the record, of course, we object to the questions that we have objected to heretofore for all the reasons that the witness is compelled to [fol. 94] use his constitutional rights because of the denial of due process of law.

A. On advice of counsel I stand on my constitutional rights. I refuse—

* * * * * * *

Mr. Piazza: I respectfully request that he be directed to answer.

Mr. Ambrose: Let me just rephrase this question. Mr. Moody, are you an official of the International Longshoremen's Association Independent or the International Longshoremen's Association which is affiliated with the AFL-CIO?

Mr. Moody: On advice of counsel I stand on my constitutional rights.

Mr. Ambrose: You are directed to answer the question.

Mr. Moody: I still stand on my constitutional rights.

Mr. Sirignano: Mr. Krieger, at this time, would you like to take the opportunity to interpret for your client and state his grounds—as you said before, with Mr. Murphy, he is a layman—on his constitutional rights?

Mr. Krieger: When an individual invokes his constitutional right, as an individual, he doesn't quite understand what right he refers to. So, it is clear for the purpose of this record, this witness stands on the constitutional right in that there's a failure to set forth full pertinency and purpose of this investigation. Details of the charges have not been set forth. This is a public hearing. He has failed to be given that opportunity. The subpoena is limited in this nature. He is invoking the privilege of self-incrimination under protest, the protest being one; that such invocation or privilege comes about as a result of the Commission's [fol. 95] denial of due process of law; and when he uses the words, "constitutional rights," that includes his rights under the Fifth Amendment of the United States Constitution, 14th Amendment of the Constitution, the Constitution of the State of New Jersey and the statutes and of the State of New York.

* * * * * * *

Mr. Piazza: I respecfully request that he be directed to answer.

Mr. Sirignano: You are hereby directed to answer that question.

A. I stand on my constitutional rights.

Q. Mr. Moody, I direct your attention to a work stoppage that occurred on Monday, May 16, 1960, at Piers A, B and C, Hoboken, the American Export Lines Terminal. Did you have any prior knowledge that that work stoppage was to take place on Monday, May 16, 1960, at that terminal?

A. On advice of counsel I stand on my constitutional rights.

Mr. Piazza: I respectfully request that he be directed to answer.

Mr. Sirignano: The Commission orders you to answer that question.

A. I stand on my constitutional rights.

Q. Mr. Moody, would you tell the Commission the source of the knowledge that you had concerning the work stoppage at Piers A, B, C, Hoboken in May, 1960?

A. On advice of counsel I stand on my constitutional rights.

Mr. Piazza: I respectfully request that he be directed to answer.

Mr. Sirignano: You are hereby ordered to answer the question.

A. I stand on my constitutional rights.

Q. Mr. Moody, did you, at any time, prior to May 16, [fol. 96] 1960, give orders to any longshoremen, shop stewards or others to commence a work stoppage on Monday, May 16, 1960 because of the presence of one James Markley on the piers as security officer?

A. On advice of counsel I stand on my constitutional rights.

Mr. Sirignano: You are hereby ordered to answer the question.

A. I still stand on my constitutional rights.

Mr. Sirignano: Mr. Piazza, before we proceed further on the questioning, I think out of fairness to the witness that he ought to be explained what this proceeding entails and what is involved.

Mr. Moody, when you are asked a question and if you feel in good conscience that the answer to that question may somehow incriminate you, you have a perfect right to invoke your privilege against self-incrimination under the statutes of New Jersey and the Constitutions of New Jersey and New York. Do you understand that?

Mr. Moody: Yes, sir.

Mr. Sirignano: In the event that you are ordered to answer a question after you had once refused to, by the statutes of New York and New Jersey, the Commission has the authority to order you to answer that question. And once they order you to answer that question, that carries with it a conferral of immunity. That means if you answer the question, and you speak about some transaction that the question is about, then you cannot be prosecuted for any part you had in that transaction and, similarly, any evidence you give or any testimony you give cannot be used against you. Do you understand that? And, in addition, if you refuse to answer, after you have been ordered to answer, or if you answer falsely, you may be subjected to [fol. 97] prosecution either for contempt or for perjury. Do you understand that?

Mr. Moody: Yes.

Mr. Krieger: Mr. Sirignano, you are representing to this witness that he could not be prosecuted criminally for any incident that took place on the Hoboken piers in the County of Hudson, State of New Jersey, American Export Lines in May, 1960, or the year 1960, by either the State Government or the Federal Government of the United States of America?

Mr. Sirignano: Mr. Krieger, if the answer is directed to that specific transaction, and if the answer is responsive, he cannot be prosecuted for anything that is contained in his answer in reference to the question that was put to him by the State of New York or the State of New Jersey. It's not necessary, as the courts have held, for the purpose of conferring immunity that it must also confer Federal immunity.

Mr. Krieger: I want to say this, with all due deference to the advice you gave my client, Mr. Sirignano. And I appreciate it, but I also want to advise my client that under the laws of the State of New Jersey, if the question would tend to, and would lead to any other evidence, he would have a right to assert his privileges, and that is the Lerner case in the Supreme Court of the State of New Jersey.

Mr. Ambrose: That is your advice to your client. Thank you very much.

Mr. Krieger: Yes.

Mr. Sirignano: You mean by that, immunity would be conferred also to that act which tends to lead or to incriminate him?

Mr. Krieger: I don't think that immunity would extend to where it would tend to lead to evidence that can be secured therefrom.

[fol. 98] Mr. Ambrose: That is your advice to your client, we may proceed.

* * * * * * *

Q. Mr. Moody, did you have any conversations with any other union official of the International Longshoremen's Association prior to May 16, 1960, about calling a strike concerning James Markley's presence on the Hoboken Terminal as a security officer?

A. On advice of my counsel, I stand on my constitutional rights.

Mr. Ambrose: You are directed by the Commission to answer the question.

A. I still stand on my constitutional rights.

Q. Would you please name the persons with whom you had these conversations?

A. On advice of counsel I stand on my constitutional rights.

Mr. Ambrose: You are directed to answer.

A. I still stand on my constitutional rights.

Q. Did you have a conversation about calling a strike during the week of May 16, 1960, with one Mr. Gleason of the ILA?

A. On advice of my counsel I stand on my constitutional rights.

Mr. Piazza: I respectfully ask—

Mr. Ambrose: You are directed to answer.

A. I stand on my constitutional rights.

Q. On the 17th of May, 1960, were you present on the terminal in Hoboken, which is called the American Export Lines Terminal? Were you present?

A. On advice of counsel, I stand on my constitutional rights.

Mr. Ambrose: The Commission directs you to answer.

A. I still stand on my constitutional rights.

[fol. 99] Q. Did you, on that date, May 17, 1960, tell the shop stewards, Frank Rump, Carmine Bruno, Eric Lempke to call the longshoremen out on strike because of the presence of Mr. Markley on the piers as a security officer?

A. On advice of counsel, I stand on my constitutional rights.

Mr. Piazza: I respectfully request that he be directed to answer.

Mr. Ambrose: You are directed to answer.

A. I still stand on my constitutional rights.

Q. Did you attend a meeting on May 17, 1960, in the offices of the American Export Lines at the Hoboken Terminal? Did you attend such a meeting?

A. On the advice of counsel I stand on my constitutional rights.

Mr. Piazza: I respectfully request that he be directed to answer.

Mr. Sirignano: You are hereby ordered to answer the question.

A. I still stand on my constitutional rights.

Q. Did you, at that meeting, state to Leland Andrews, another official of the American Export Lines, who attended the meeting, if Markley walks on the piers there would be a work stoppage?

A. On advice of counsel I stand on my constitutional rights.

Mr. Piazza: I respectfully request that he be directed to answer.

Mr. Sirignano: The Commission orders you to answer that question.

A. I still stand on my constitutional rights.

Q. Did you, either before May 16, 1960, or during the week of May 16, 1960, speak to Michael McNamara concerning a work stoppage at the American Export Lines Terminal over the presence of Mr. Markley on the piers?

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[fol. 100] Mr. Krieger: I am objecting to the question for all the reasons heretofore given, and also urge, in the Murphy situation and the Murphy questioning the additional grounds to be considered here, as well as the Murphy questioning, that there is a limitation and preemption. We respectfully contend that does not give this Commission jurisdiction. These questions are presently pending before the United States Supreme Court and not as yet finally determined by the United States Supreme Court. We urge all the reasons without encumbering the record. I think by stipulation we agreed it is unnecessary to do so. The reasons we urged in our jurisdictional statement to the United States Supreme Court, on jurisdiction, to the United States

Supreme Court, on the questions raised in that issue, and in those papers filed, which the Waterfront Commission has a copy, for reasons why this investigation and this conduct, this hearing should not continue and these questions are improper, and for all the other reasons.

Mr. Ambrose: I don't quite understand your objection. Are you saying you have some other law suits pending when you raise the judicial issue?

Mr. Krieger: That's correct.

Mr. Ambrose: And that we have no right, there is no pertinency to these questions?

Mr. Krieger: Yes.

Mr. Ambrose: Is that what you mean?

Mr. Krieger: Yes.

Mr. Ambrose: You may proceed.

Mr. Krieger: And that the record, instead of offering it physically here, that was filed in the United States Supreme Court, be considered part of this file, in this record.

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Q. Prior to May 16, 1960, or during the week of May 16, 1960, did you have a conversation with Michael McNamara, concerning a work stoppage to be called on May 16, 1960, [fol. 101] over the presence of James Markley on the Hoboken Terminal as a security officer?

A. On advice of counsel I refuse to answer. I stand on my constitutional rights.

Mr. Ambrose: You are directed to answer.

A. I still stand on my constitutional rights.

Mr. Ambrose: May I interrupt. Do you know Michael McNamara, Mr. Moody?

Mr. Moody: On advice of counsel I still stand on my constitutional rights.

Mr. Ambrose: You are directed to answer.

Mr. Moody: I still stand on my constitutional rights.

Mr. Ambrose: Do you know Mr. William Murphy?

Mr. Moody: On advice of counsel, I stand on my constitutional rights.

Mr. Ambrose: You are directed to answer.

Mr. Krieger: I am going to object.

Mr. Ambrose: Just a minute. You make your objection when I finish.

Mr. Moody: I still stand on my constitutional rights.

Mr. Ambrose: Do you see Mr. Murphy sitting in this room?

Mr. Krieger: I am going to object. I have a right to object.

Mr. Ambrose: All right, you object.

Mr. Krieger: Now you are getting into the same sphere that was highly criticized by the United States Supreme Court in an investigation of this nature. Something like a question: "Do you hate your mother;" or, "Do you beat your mother." The witness, because if he opens up the door, and he answers one question, he may lead to the answer of other questions or he may be compelled to answer, and I [fol. 102] respectfully contend that it is improper examination in that respect as to who he sees or whether or not he sees you on the bench, because under the circumstances it may be a question of opening the door.

Mr. Ambrose: Mr. Krieger, just for the purpose of the record, I would like to indicate my purpose of asking this question. The question is to determine, in fact, if the witness will answer any questions at all, and end up this investigation.

May we proceed. Your objection is overruled.

Mr. Krieger: To answer you, Mr. Ambrose,—

Mr. Ambrose: I am directing Mr. Moody, at this time, to answer whether or not Mr. William Murphy is in this courtroom.

Mr. Wall: I object to the question as being irrelevant, immaterial and having no part of the investigatory powers.

Mr. Ambrose: Your objection is noted.

Thank you, Mr. Wall.

You are directed to answer.

Mr. Moody: I stand on my constitutional grounds.

Mr. Sirignano: Do you know Leland Andrews, Mr. Moody?

Mr. Moody: On advice of counsel I stand on my constitutional rights.

Mr. Sirignano: You are ordered to answer that question.

Mr. Moody: I still stand on my constitutional rights.

Mr. Sirignano: Do you know Mr. Lyle Bull, Executive Vice President of the American Export Lines?

Mr. Moody: On advice of counsel I stand on my constitutional rights.

Mr. Sirignano: You are ordered to answer the question.

[fol. 103] Mr. Moody: I still stand on my constitutional rights.

Mr. Ambrose: Did you, at any time, either in Hudson County, in the State of New Jersey, or in the County of New York, in the State of New York, have any discussions with any executives of the American Export Lines, concerning Mr. Markley's employment with that shipping company?

Mr. Moody: On advice of counsel, I stand on my constitutional rights.

Mr. Ambrose: You are directed to answer.

Mr. Moody: I still stand on my constitutional rights.

Mr. Ambrose: Do you know whether Mr. Markley has ever been on the piers in the performance of his duties as security officer of the American Export Lines since his employment in May of 1960?

Mr. Moody: On advice of counsel I stand on my constitutional rights.

Mr. Ambrose: You are directed to answer.

Mr. Moody: I still stand on my constitutional rights.

Mr. Ambrose: Do you have any further questions, Mr. Piazza?

Mr. Piazza: I see no point in continuing the examination.

Mr. Ambrose: Neither do I.

Mr. Piazza: I move that it be adjourned, and further move for an action on contempt.

Mr. Ambrose: So do I.

Mr. Malchman, will you step up to the bench, please.

Mr. Malchman, you are directed by the Commission to file such proceedings that are necessary in connection with contempt of this witness.

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[fol. 104] Mr. Ambrose: You are excused, Mr. Moody.

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Mr. Piazza: I move that the matter be terminated.

Mr. Ambrose: The proceeding is terminated, for the time being, this phase, I should say of the investigation.

(7:55 P. M.)

IN THE SUPERIOR COURT OF NEW JERSEY

Excerpts From Exhibits Introduced by Waterfront Commission in Proceedings of October 27, 1961, Before "Designees" of Said Commission

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EXHIBIT 1 (CERTIFICATION NOT PRINTED)

LETTERHEAD OF

WATERFRONT COMMISSION OF
NEW YORK HARBOR

Secretary
Waterfront Commission of New York Harbor
15 Park Row
New York 38, New York

Dear Sir:

The Waterfront Commission has subpoenaed William Murphy to appear and testify in an investigation initiated by the Commission and conducted pursuant to the provisions of the Waterfront Commission Act, Part I, Article IV. By virtue of the authority vested in me by the Waterfront Commission Act, Part I, Article III, Section 3, I hereby designate Myles J. Ambrose, Executive Director of said Commission, to act in my place as a member of the Commission at such investigation on any occasion at which I am unable to attend and to confer immunity upon said William Murphy pursuant to the provisions of the Waterfront Commission Act, Part II, Section 5-b(5).

[fol. 105] This authority and designation to act in my place or the purpose of said investigation shall take effect immediately and shall continue in force until revoked by written instrument filed in the office of the Secretary of the Commission.

Dated: October 13, 1961

/s/ Harold R. Tyler, Jr.,
Commissioner.

cc: Comm. Tyler
Comm. Thompson
M. J. Ambrose
W. P. Sirignano

Exhibit 5 (Certification of Mailing Not Printed)

October 10, 1961

Honorable Lawrence A. Whipple
Prosecutor of Hudson County
Hudson County Court House
Jersey City 6, New Jersey

Dear Mr. Whipple:

This Commission, pursuant to its investigatory powers under Article IV of Part I of the Waterfront Commission Act (N. J. S. A. 32:23-10) is presently conducting an investigation into a strike that took place at the American Export Line Terminal in Hoboken, New Jersey on May 16 through May 20, 1960. As part of this investigation, to determine whether any violations of the Compact were committed, this Commission has questioned William Murphy and John Moody, Sr., officials of the International Longshoremen's Association, while under subpoena, concerning this strike. Mr. Murphy's most recent known address is 218 [fol. 106] Roosevelt Street, Union City, New Jersey. Mr. Moody's most recent known address is 1114 Washington Street, Hoboken, New Jersey.

Heretofore, Messrs. Murphy and Moody have refused to answer questions concerning their participation in the strike of May 16, 1960. On May 22, 1961 the New Jersey Supreme

Court affirmed the civil contempt judgment of the Superior Court dated June 20, 1960. They appeared on October 3, 1961 as witnesses at the offices of the Waterfront Commission pursuant to the civil contempt judgment. Both Messrs. Murphy and Moody refused to answer questions on the grounds that such answers might tend to incriminate them.

In accordance with § 5-6(5) of Part II of the Waterfront Commission Act (N. J. S. A. 32:23-86), this Commission wishes to confer immunity on William Murphy and John Moody, Sr., with respect to their testimony concerning the foregoing subject matter. The purpose of this conferral of immunity is to obtain the actual facts concerning the strike called on May 16, 1960 against the American Export Lines in Hoboken, New Jersey.

Pursuant to the requirements of law, written notice must be given to the appropriate State attorney general and the appropriate district attorneys or prosecutors having an official interest therein 24 hours in advance of the granting of immunity by the Commission. Accordingly, this Commission will proceed with its investigation after the expiration of this 24 hour period. In the event that you have any comments on this procedure, we would appreciate being advised as soon as possible.

Sincerely yours,

Myles J. Ambrose
Executive Director

* * * * * * *

[fol. 107]

October 23, 1961

Honorable Frank Hogan
District Attorney, New York County
New York, New York

Dear Mr. Hogan:

This Commission, pursuant to its investigatory powers under Article IV of Part I of the Waterfront Commission Act (McK. Unconsol. Laws, Title 29, Book 65, Part III, Subdivision 3, Section 9906) is presently conducting an investigation into a strike that took place at the American Export Line Terminal in Hoboken, New Jersey on May 16 through May 20, 1960. As part of this investigation, to determine whether any violations of the Compact were committed, this Commission has questioned William Murphy and John Moody, Sr., officials of the International Longshoremen's Association, while under subpoena, concerning this strike. Mr. Murphy's most recent known address is 218 Roosevelt Street, Union City, New Jersey. Mr. Moody's most recent known address is 1111 Washington Street, Hoboken, New Jersey.

Heretofore, Messrs. Murphy and Moody have refused to answer questions concerning their participation in the strike of May 16, 1960. On May 22, 1961 the New Jersey Supreme Court affirmed the civil contempt judgment of the Superior Court dated June 20, 1960. They appeared on October 3, 1961 as witnesses at the offices of the Waterfront Commission pursuant to the civil contempt judgment. Both Messrs. Murphy and Moody refused to answer questions on the grounds that such answers might tend to incriminate them.

In the course of the investigation it may become relevant to question Messrs. Murphy and Moody about meetings that took place in New York County with officials of the American Export Line in August of 1960 at 39 Broadway and at the apartment of Admiral Will.

[fol. 108] In accordance with §5-b(5) of Part II of the Waterfront Commission Act (Section 9906, McK. Unconsol. Laws), this Commission wishes to confer immunity on William Murphy and John Moody, Sr., with respect to their testimony concerning the foregoing subject matter. The purpose of this conferral of immunity is to obtain the actual facts concerning the strike called on May 16, 1960 against the American Export Lines in Hoboken, New Jersey.

Pursuant to the requirements of law, written notice must be given to the appropriate State attorney general and the appropriate district attorneys or prosecutors having an official interest therein 24 hours in advance of the granting of immunity by the Commission. Accordingly, this Commission will proceed with its investigation after the expiration of this 24 hour period. In the event that you have any comments on this procedure, we would appreciate being advised as soon as possible.

Sincerely yours,

Myles J. Ambrose
Executive Director

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[fol. 109]

Exhibit 6

State of New Jersey
David D. Furman
Attorney General

October 18, 1961

Mr. Myles J. Ambrose
Executive Director
Waterfront Commission of
New York Harbor
15 Park Row
New York 38, New York

Dear Mr. Ambrose:

I have your recent letter in which you furnish the information that the Waterfront Commission seeks to confer immunity on William Murphy and John Moody, Sr., with respect to their testimony relevant to the investigation of the American Export Line Terminal strike.

As Attorney General of New Jersey I have no objection to the Commission's so conferring immunity pursuant to N. J. S. A. 32:23-86.

This office will be interested in learning the outcome of the investigation.

Sincerely yours,

David D. Furman
Attorney General

DDF:jk

[fol. 110]

EXHIBIT 7

Letterhead of District Attorney of the County of New York

October 25, 1961

Honorable Myles J. Ambrose
Executive Director
Waterfront Commission
of New York Harbor
15 Park Row
New York 38, New York

Dear Mr. Ambrose:

Thank you very much for your letter of October 23 in which you advise me that the Commission may decide to confer immunity upon William Murphy and John Moody, Sr. in connection with your investigation into a strike that took place at the American Export Line Terminal in Hoboken, New Jersey on May 16 through May 20, 1960.

This office has no objection to the proposed offers of immunity to the two individuals mentioned. Your kindness in communicating with us in this matter is much appreciated.

Sincerely,

FRANK S. HOGAN

[fol. 111] **Exhibit 8**

Letterhead of State of New York, Department of Law

October 26, 1961

Hon. Myles J. Ambrose
Executive Director
Waterfront Commission of New York Harbor
15 Park Row
New York 38, N. Y.

Dear Mr. Ambrose:

This is to acknowledge receipt of your letter dated October 24, 1961 concerning William Murphy and John Moody, Sr.

This office has no objection to the proposed grant of immunity to the above-named persons.

Very truly yours,

Louis J. Lefkowitz
Attorney General

By: S. A. Hirshowitz
Samuel A. Hirshowitz
First Assistant
Attorney General

[fol. 112]

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION—HUDSON COUNTY

Docket No. L-4257-61, L-4258-61

Civil Action

IN THE MATTER

of

the Application of the WATERFRONT COMMISSION OF NEW YORK HARBOR to Punish WILLIAM MURPHY for Failure to Obey a Subpoena.

IN THE MATTER

of

the Application of the WATERFRONT COMMISSION OF NEW YORK HARBOR to Punish JOHN MOODY, SR., for Failure to Obey a Subpoena.

(For Civil and Criminal Contempt)

DEFENDANTS' ANSWER TO MOTIONS FOR CONTEMPT

Answering the motions of the Waterfront Commission of New York Harber in the above entitled cause, to punish the defendants for contempt, the defendants say:

1. Defendants deny each and every allegation set forth in the Motion of the Waterfront Commission of New York Harbor, and leave the Movant to their proof as to the allegations contained therein.

First Separate Defense

The purported conferral of immunity upon the defendants was invalid and of no legal force and effect because [fol. 113] (a) it expressly excluded immunity against federal incrimination; (b) it was done in violation of statutory and constitutional provisions pertaining to delegation and sub-delegation of the power to confer such immunity; (c) it did not comply with the statutory requirements for notification to the law officers of the respective states; (d) it was not conferred upon each of the defendants as to each question asked with the requisite explicitness and certainty to assure the effectiveness of the purported immunity; (e) it was a denial of due process of law, both state and federal, for all of the reasons set forth in this answer.

Second Separate Defense

The Commission does not have and has never had jurisdiction to subpoena, to interrogate, to move for contempt against, or to extend immunity to the defendants in regard to the subject matter hereof, in that said subject matter does not come within any of the statutory granted powers of the Commission and in that said subject matter is preempted by the Federal Labor Management Relations Act.

Third Separate Defense

The Commission is and at all times had been without constitutional power to interrogate the defendants or to proceed against them in regard to contempt or immunity, because at each of the respective legally determinative stages of these proceedings, including the prior interrogational and contempt proceedings, the Commission has denied to the defendants due process of law under the federal and state constitutions by failing to give them adequate apprisal of the purpose and pertinency of the interrogations.

Fourth Separate Defense

The denial of federal and state due process to the defendants which was occasioned by the Commission's failure to give them adequate apprisal of purpose and pertinency in the prior interrogation and contempt proceedings is an [fol. 114] integral part of the continuing denial of due process in the instant contempt proceedings. The denial of due process in the instant contempt proceedings arises from the cumulative effects of said prior denials of due process plus the subjection of the defendants, in further violation of federal and state due process of law, to a procedure in the instant proceedings for immunity and contempt whereby the defendants were forced to act in the dark, without an opportunity to form a rational choice, as to whether or not to invoke the privilege against self-incrimination under the threat by the Commission to confer immunity. These unconstitutional procedural disadvantages were inflicted upon the defendants by reason of the Commission's refusal to apprise them of the incriminatory information in its possession and by its refusal to produce any witnesses against them for confrontation and cross examination, thereby depriving the defendants of their due process right and opportunity to determine on a rational and fairly informed basis whether or not to incur the grave legal and social disadvantages of invoking the privilege against self-incrimination, and likewise whether to incur the severe legal disadvantages of a coercively conferred "immunity."

Fifth Separate Defense

Defendants further assert that the Movant has failed to grant immunity as required by law, and defendants cannot be denied the constitutional and statutory right to assert the privilege against self-incrimination.

An examination of the Movant papers demonstrates an acknowledgment that the attempted conferring of immunity was not as broad as the continued use of the privilege as provided for by statute.

Krieger & Chodash, By .... Robert Wall,
Attorneys for Defendants.

[fol. 115]

IN THE SUPERIOR COURT OF NEW JERSEY

DEFENDANTS' NOTICE OF MOTION FOR BILL OF PARTICULARS

To: Robert A. Pin, Esq., Attorney for the Waterfront Commission of New York Harbor, 60 Hudson Street, Hoboken, New Jersey.

Sir:

Please take notice that on Tuesday, November 21, 1961, at 10:00 A. M. in the forenoon, or as soon thereafter as counsel may be heard, before the Honorable Joseph L. Smith, J. S. C., at the Court House, Jersey City, New Jersey, the undersigned will move for a bill of particulars on behalf of both of the defendants in the above captioned cause. The particulars to be sought by the defendants are:

1. What is the information, if any, which the Waterfront Commission of New York Harbor possesses, pointing to the conclusion that the longshoremen's work stoppage at piers A, B and C of the American Export Lines in Hoboken, New Jersey, between May 16 and May 20, 1960 constituted a violation of the Bi-State Waterfront Commission Compact; and more particularly, how does any such information possessed by the Commission point to the conclusion that the defendants, William Murphy and John Moody, Sr., had knowledge of, or had any participation in, any such violation of said Bi-State compact? The particulars which the defendants demand in this paragraph 1 shall please state, in full detail, names, places, dates, and subject matter concerning any conversations or other communications between any persons, including the Commission, its staff, any other government officials, the defendants, any of their alleged collaborators, any of the persons to whom they are alleged to have made any threats or demands in connection with the subject matter herein, any informants (direct [fol. 116] or indirect) from whom the Commission has received information relevant to the subject matter of this paragraph 1.

2. Did the Commission possess, prior to 3:00 P. M. May 19, 1960, any of the information requested under paragraph

1 above? If so, please specify in detail such information so possessed by the Commission prior to said time.

3. Specify in detail, in the manner and detail requested in paragraph 1 above, any and all information possessed by the Commission which points to the conclusion that any actions of the defendants Murphy and Moody in connection with the work stoppage referred to in paragraph 1 above, or any information possessed by Murphy and Moody relating to such work stoppage, constitutes a subject matter of which the Commission had continuing jurisdiction after the termination of said work stoppage or has continuing jurisdiction down to the present time. In replying to this paragraph, the Commission is requested to specify in full factual detail all of the circumstances of which it has knowledge, and names, places and dates pertinent thereto, which would support or tend to support the conclusion that the Commission's continuing attempts to interrogate the defendants Murphy and Moody since October 3, 1961 and down to the present time are justified as relating to a subject matter within the jurisdiction of the Commission and not preempted by the Federal Labor Management Relations Act.

4. State in detail, in the manner requested in paragraph 1 above, the information in the possession of the Commission which points to the conclusion that the alleged continuing absence of James A. Markley from piers A, B and C of the American Export Lines in Hoboken, New Jersey is (a) a matter involving a violation of the bi-state compact; and (b) attributable to any conduct of defendants Murphy or Moody; or (c) is a matter of which they have knowledge.

[fol. 117] 5. Taking each and every question which the Commission addressed to the defendants Murphy and Moody in the respective interrogational proceedings on May 19, 1960, October 3, 1961, and October 27, 1961, please state in full factual detail, in the manner requested in paragraph 1 above, what information, if any, the Commission possessed at said respective times which supported or tended to support the conclusion that each of such questions dealt with a subject matter which involved violation of the bi-state compact, or involved any other matter of which the Commission had jurisdiction at said respective times, as distinct from matters of which the National Labor Relations Board had jurisdiction, either exclusive or concurrent.

6. Please set forth in full factual detail, in the manner requested in paragraph 1 above, including production of authenticated copies of all pertinent documents, records, notes and memoranda of any kind, an account of any and all communications and other dealings, oral or written, between the Commission and any officials of the United States Government relating to the subject matter of the Commission's interrogation of defendants Murphy and Moody on May 19, 1960, October 3, 1961 and October 27, 1961, and relating to each and every question addressed by the Commission to said defendants on said dates, whether such dealings or communications with officials of the United States Government had preceded or followed said dates or have occurred on the said dates.

7. In the same manner as is requested for the Commission's response to paragraph 6 above, set forth in full factual detail, including all relevant documentation, what have been the communications or other dealings, oral or written, between the Commission and each and every one of the state law officers (attorney generals and district or prosecuting attorneys) of New York and New Jersey concerning the same subject matter as is referred to in paragraph 6 hereof.

[fol. 118] 8. Set forth in full factual detail, in the manner requested in paragraphs 1, 6 and 7 hereof, the circumstances of all communications or other dealings, written or oral, between Commissioners Harold R. Tyler, Jr. and David C. Thompson, on the one hand, and any and all other employees or officials of the Commission on the other hand, from which the defendants Murphy and Moody, and the court or courts having jurisdiction of the within contempt proceedings, and any jury in such proceedings, may fairly and rationally determine whether said Commissioners Tyler and Thompson have duly discharged their official functions in relation to the subject matter of the instant contempt proceedings and of the prior contempt proceedings herein, and in relation to the conferral of immunity on the defendants herein, or whether said Commissioners Tyler and Thompson have abdicated said functions or have exercised them without proper regard to their own personal exercise of their official responsibilities in the premises. In furnishing the particulars requested under this paragraph, it is requested that Commissioners Tyler and Thompson set forth any and all communications or other dealings, written or oral, pertinent thereto, and that they not merely recite once again the formal documents purporting to exhibit the supposed exercise of their authority in the premises. It is the object of this paragraph to ascertain, in full factual detail, whether Commissioners Tyler and Thompson, at any or all stages of the instant or prior proceedings against defendants Murphy and Moody, have exercised a responsible statutory discretion with adequate knowledge of the facts of the case, or whether the within interrogational and contempt proceedings, as well as the purported conferral of immunity upon the defendants, have been in effect the results of assumptions of responsibility and authority by persons other than Commissioners Tyler and Thompson.

[fol. 119] In support of the within motion for a bill of particulars, the defendants will rely on their brief filed in the Superior Court of New Jersey, Hudson County on November 10, 1961, their supplemental and reply brief filed in said Court on November 15, 1961, their "Verified Answer to Motions for Contempt," their interrogatories filed herewith, their "Memorandum in Support of Right to Discovery by Motion for Bill of Particulars and Interrogatories" and the record of this cause and of the prior contempt proceedings herein.

Krieger & Chodash, By .... Harold Krieger,
Robert Wall, Attorneys for Defendants.

Dated: ....

[fol. 120]

IN THE SUPERIOR COURT OF NEW JERSEY

To: Robert A. Pin, Esq., Attorney for the Waterfront Commission of New York Harbor, 60 Hudson Street, Hoboken, New Jersey.

DEFENDANTS' REQUEST FOR JURY TRIAL—November 16, 1961

Sir:

Please take notice that on November 21, 1961, at 10:00 A. M. in the forenoon, or as soon thereafter as counsel may be heard, before the Honorable Joseph L. Smith, J. S. C., at the Court House, Jersey City, New Jersey, the undersigned attorneys for the defendants herein, will make demand for a jury trial in these proceedings for civil and criminal contempt, subject to the following conditions: If the Court denies the motions for contempt or otherwise disposes of those motions favorably to the defendants on any of the grounds of law asserted in the defendants' answer to said motions, this demand for jury trial will become inoperative. It is the defendants' intention to request the Court to dispose first of all such issues of law, and further, if the motions for contempt are not denied on such grounds of law, it is defendants' further intention to move that the trial of the issues of fact herein shall be deferred pending completion of the discovery proceedings which the defendants shall seek herein pursuant to their motion for bill of particulars and their interrogatories.

In support of this demand for jury trial, defendants rely on R. R. 3:8-3 and 4:87-3.

Krieger & Chodash, By .... Robert Wall,
Attorneys for Defendants.

Dated: November 16, 1961.

[fol. 121]

In the Superior Court of New Jersey

Excerpts From Testimony

November 21 and 22, 1961.

Before:

Hon. Joseph L. Smith, *J. S. C.*

Appearances:

Robert A. Pin, Esq., and Irving Malchman, Esq., for the Waterfront Commission of New York Harbor.

Harold Krieger, Esq. (Krieger & Chodash) and Robert H. Wall, Esq., for the Defendants.

Colloquy re Motions

(2)* The Court: Mr. Pin, may I have a statement from you as to what matter you are here on? The matter that you are the moving party on.

Mr. Pin: This is an application by the Waterfront Commission of New York Harbor, pursuant to the Statutes and Rules, moving this Court to find John Moody, Sr., and William Murphy guilty of contempt of this Court after refusal without justification to obey a valid subpoena. More particularly, it is addressed to the refusal of both Murphy and Moody to answer pertinent questions before the Waterfront Commission upon an alleged claim that their answers may tend to incriminate them despite the fact that immunity has validly been conferred upon them in accordance with the Statute in such case made and provided.

The moving papers contain the entire transcript of the action to date, including in full the questioning and the answers or purported answers along with argument of counsel for both Murphy and Moody and are annexed to our moving papers as exhibits thereto.

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* References in parentheses are to pages of the Transcript of Testimony.

(3) The Court: Is this pursuant to a Rule to Show Cause made on the 3rd of November, 1961, by Judge Artaserse? [fol. 122] Mr. Pin: The order was actually made November 1st, though returnable on November 3rd.

The Court: And adjourned until today.

Mr. Pin: Pursuant to your instructions it was adjourned until today for full briefing.

The Court: That is your motion?

Mr. Pin: Yes, sir.

The Court: Mr. Krieger, may I have a statement of what you gentlemen are the moving parties on?

Mr. Krieger: I appear, Harold Krieger, of the law firm of Krieger and Chodash, and Robert Wall appears for both of the defendants, namely, John Moody, Sr., and William Murphy, the defendants in this cause.

The Court: Which one do you appear for?

Mr. Krieger: We appear for both jointly.

The Court: You both appear for both?

Mr. Krieger: Both of the defendants.

The Court: You appear in opposition to this Rule to Show Cause?

(4) Mr. Krieger: Yes, sir.

The Court: And what is your motion?

Mr. Krieger: Our motion is for a dismissal of the Order to Show Cause and a finding by the Court that the defendants herein are not guilty of any contempt. May I state further for the Court that we heretofore had a motion returnable—

The Court: I want to know all the motions that we've got.

Mr. Krieger: We originally had a motion returnable on the 3rd day of November, 1961, which was adjourned until today, for a dismissal of the subpoena, and the reasons set forth in that motion, if your Honor please, are such that we can say that both of the matters can be argued together, because a disposition of one—

The Court: I don't understand what that motion is. What was that motion?

[fol. 123] Mr. Krieger: That motion—

The Court: Was that a motion to quash the subpoena?

Mr. Krieger: That is the intent.

The Court: What was your motion?

(5) Mr. Krieger: A motion to quash the subpoena.

The Court: When was that returnable?

Mr. Krieger: The 3rd day of November, 1961, and carried until today.

The Court: All right. That was the motion to quash the subpoena. What else? That was consolidated with the present motion of the Waterfront Commission to hold these two men in contempt.

Mr. Krieger: That is correct. Now, we have three other motions, one for a jury trial, that is, in the event that the Court makes an adverse ruling insofar as the law is concerned in the case, which is the first issue before the Court, and the Court then determines that there is a question to be decided here other than the law that is applicable thereto, then we have a motion for a jury trial, and a motion for a bill of particulars, and a motion for interrogatories.

The Court: Is there a separate Notice of Motion for interrogatories?

Mr. Krieger: No, your Honor. Under the Rules, that is not a motion. Under the Rules, that is served, the original of which (6) was served.

The Court: How does that come before me?

Mr. Krieger: To compel answers thereto.

* * * * * * *

(6-11) The Court: * * * I have no Notice of Motion for that. If you want to now put on the record a Notice of Motion to compel answers to interrogatories—will you accept notice of that motion?

Mr. Pin: To the extent that that motion is co-extensive with a motion to compel discovery. It covers the same area—.

The Court: That's right.

[fol. 124] Mr. Pin: If it is represented by counsel as it is in his brief, I have no objection to that coming before the Court at the present time.

The Court: The matter is not before me until that is done.

All right. You may proceed.

* * * * * * *

[fol. 149] Mr. Krieger: If your Honor please, I respectfully submit that ordinarily when, before a State agency or body or any other forum, a witness asserts privilege and the body or forum determines that the witness hasn't the right to assert privilege, the matter then comes into court on a motion or in some other form to compel an answer and the Court determines factually as to whether or not the witness had any apprehension. Now, the question for us to determine at this moment is: Is it necessary to determine factually as to whether or not there is any apprehension on the part of the defendants, or are the facts before the Court sufficient for the Court to make a determination of apprehension because of the statements made, the environment of the investigation, the purposes of the investigation, the statements made by the Waterfront Commission that they are investigating a crime, an illegal act? Is that sufficient?

I respectfully submit it is sufficient. I submit it is sufficient, where the Waterfront Commission came into open court and said in (54) this matter, "We recognize the right of the defendants in this instance to plead privilege of self-incrimination because of the offense that may be involved."

I, therefore, respectfully submit that factually it appears upon its face, but if it should be determined that factually it does not appear upon its face sufficiently, then the Court or counsel would be duty bound to offer additional testimony for the Court to make a determination factually if that were so; and how would such proof be offered? Such proof would be offered either by putting the witness on the stand who would say upon examination of the testimony in this case—somebody qualified as a Federal attorney in Federal laws—and say that an examination of the testimony, an examination of the charges, an examination of the incidents, all these incidents, would be sufficient to charge so-and-so with this type of a crime.

The Court: The petitioner says among other reasons for this investigation was to determine whether there had been [fol. 150] any violation not only of the Compact but any rules or (55) articles looking to revocation of any permits or licenses that may have been granted.

Mr. Krieger: Your Honor is absolutely correct, "among other purposes." In other words, the exclusive purpose of this investigation—even if the exclusive purpose of the investigation was limited to that only, but they didn't say that was the exclusive purpose, but if it was the only, exclusive purpose and it would appear that in that exclusive purpose a person could be involved in a criminal offense that would go outside of giving testimony for that purpose, he would have the right to assert privilege even under those circumstances, but that is not involved here.

As I started saying, factually, the only other way that additional facts would be necessary—and again I say I respectfully submit the record is so abundant, their own record, with their own statement of an illegal act, coercion, violation of the law, the fact that we were going on the waterfront to keep watchmen off the waterfront, that there is a reasonable inference that could be taken therefrom; but, as I started to say, if (56) additional proof would be required, there could be an examination of the defendants, themselves, but that examination, if your Honor please, would be a very limited one because again the right of privilege exists.

You could say, "What acts could you possibly be involved in?" and the individual could possibly say, "There are a number of Federal acts," but you could not ask him in what way, the manner in which, because then you would be forcing him to testify against himself, and that is what the courts have stated. The courts have said specifically, "All surrounding factors, circumstances, type of agency, purposes," and so forth. This agency is a law enforcement agency:

• • • • • • •

[fol. 153] As far as the area of apprehension, that is not difficult in this situation, because (62) there are numerous situations, there are numerous statutes, which are applicable, and they are cited in our brief: and might I state that the Court recognizes that counsel has a right in his argument before the Court to point out wherein they appear so the Court is not called upon to guess, and in this instance the Court is not called upon to do so, as I will soon indicate to the Court.

In Title 18 of the United States Code, Annotated, Section 371, we start off with conspiracy, and that is what they contend here, that there was a conspiracy on that day to do certain things, namely, on May 17th or May 16, 1960.

"Conspiracy to commit an offense or to defraud the United States.

"If two or more persons conspire either to commit any offense against the United States—"

The Court: What section of the Code is that?

Mr. Krieger: That is 371, if your Honor please. That is the broad conspiracy statement. So that we have the conspiracy here. Now, (63) conspiracy to commit what? Could there be any lead, could there be any connection in any manner?

Then, your Honor please, your Honor will recall they had said they were investigating—as a result of numerous thefts from the piers that they had set up this investigation, because of thefts from the piers and these wharfs, and that they had separated the watchmen from the union as such so there could be no control, and that they also say in their [fol. 154] history annexed to their moving papers, in their affidavit, that the union continued to try to control the watchmen. As they said in their record, they even quoted from testimony given, testimony given in hearings that an individual who is a watchman had been reprimanded by a union official because he had turned in someone who had committed a theft on the pier, and that is why they didn't want to have watchmen under control of the union, as such, and separating them, and in this instance, because Markley was not a member of this union, because Markley, as they say, was an independent individual formerly employed by the Waterfront Commission (64) who was given a job by the American Export Lines as a watchman, it was reasonable to conclude they had no control over him.

The Court: As I read the record, Markley has not worked a single day on the pier yet.

Mr. Krieger: That is right. They said he worked there when he was brought upon the pier. They say he is working for the company but he is not permitted to go on the pier. That is their contention, he is employed by the company. They admit employment by the company.

The Court: The reason for that is one of these two gentlemen said if he did they would call a strike.

Mr. Krieger: They also said a strike was called and a stoppage did ensue. That is what they said.

Now, if the Court please, Section 659 of Title 18 goes into—I just read "Conspiracy—" goes into any theft that may take place or had taken place in a conspiracy to commit the act. I read "Conspiracy" and the act itself, and I say under that statute these people, if (65) it is contended that there were these thefts going on, that there was a conspiracy to commit thefts by keeping a watchman off the waterfront who is not a member of their union, who they didn't control, therefore, Markley or someone who they didn't control would be taken off the waterfront and they would continue in a conspiracy and continue the thefts. That lies in that statute, and it is not necessary to substantiate every element [fol. 155] of every offense: It is sufficient that any single incident could be a part thereof or could be a link to it in any manner. That is statute number one. There is an indication in that respect, too.

Then we have Title 18, Section 1951, "Interference with commerce by threats or violence." There is no question, if your Honor please, this is commerce. That is admitted here. That is not in dispute. This is a waterfront; this is a pier; this is a wharf; engaged in interstate commerce. No question about that. If there is, we will produce proof immediately, and I am sure they will admit that is so.

(66) "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce by robbery or extortion or attempts or conspires so to do or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section," shall be guilty. Now, that is statute number two.

As I pointed out, any one of these acts could be an element of it, could lead to and become a part of it.

The Court: I don't recall that these respondents were charged with any of these offenses.

Mr. Krieger: Oh, no, your Honor. They were not charged with the offense itself, but it is not necessary to charge the offense in so many words. It is not necessary to do so for an individual to use privilege. It is sufficient for an individual—an individual had a right, statutorily by the State of New Jersey, constitutionally by the 14th Amendment, of due process today to assert privilege if anything could be an element of any crime, and (67) they say it was illegal coercion, if your Honor recalls the words from a quotation by them. Not our words; theirs.

Now, if your Honor please, consequently, if you take their facts, as they state them, you have this: You have Section 4 of the Federal Code, United States Code, Annotated, Title 18, which states:

[fol. 156] "Whoever having knowledge of the actual commission of a crime cognizable by a court of the United States conceals and does not as soon as possible make known the same—" that is the present statute, if your Honor please. They say an illegal act and they want to know about it, and if they don't get the information and they had the information and do not disclose it, they are guilty of this act for not having disclosed it immediately as required by this Statute.

And we have one that is apparent—though by any language, sir, it would be difficult to escape—and that is Title 18, Section 241:

"If two or more persons conspire to injure, oppress, threaten, or intimidate any (68) citizen in the free exercise or enjoyment of any right or privilege secured by him by the Constitution or laws of the United States, or because of his having so exercised the same," it constitutes a criminal offense.

In other words, in this instance the civil rights statute, where a person has a right to work, their interference with this individual's right to work in this instance constitutes a violation of the civil rights of this individual.

Their answer to that—they regognize that without even bringing it to their attention. They say there is a guarantee of the right to work. There is no question about that. Every person is guaranteed the right to work. The United States has passed a Statute to make sure there is no interference with that right to work.

People can't come upon a pier and say, "Judge Smith, Harold Krieger, you can't come upon this pier. If you do we'll take everybody off." They say in the papers "to discharge him." They say "interference." That was in their moving papers, to force them, to (69) coerce them, to illegally do that. That constitutes a criminal offense.

I respectfully submit I didn't find it necessary to go any further because there are so many things that could lead to possible incrimination in this particular case where we [fol. 157] are engaged in a wharf, a pier, where so many acts have been passed relative to it. It leaves no room for argument, because we have a general provision that is simple. I have cited it, and that is the one of interstate commerce under the Interstate Commerce Act. Anyone who interferes with the free movement of commerce between states, anyone who interferes with interstate commerce, shall be guilty of a criminal offense under the interstate commerce laws. That is as simple as it has become. We can't escape from it. There is no question that the stoppage constituted interference with interstate commerce, from what they say.

I respectfully submit that we cannot argue that there is not a possible incrimination here, we cannot argue that there is not a force, we cannot argue that there is not (70) some link, we cannot argue that the immunity is not as broad as the privilege. We must admit under these circumstances these people could possibly—not they must—they could possibly—those are the words, could possibly be involved or become involved by their testimony if called upon to testify and lead to other testimony, if your Honor please, in the link of the chain.

Now, I respectfully submit that it becomes quite apparent that these defendants have not had granted to them or could have granted to them the type of immunity that would take away from them the right to use privilege, which in this instance the Waterfront Commission has admitted they had a right to use, because if they don't make it clear in their moving papers, or if it seems unclear in their moving papers, I must respectfully request the Court for leave to put in affirmative testimony showing it. I think it is shown, but if the Court feels otherwise or if they contend otherwise, affirmative proof will be offered.

The Court: I want to make it perfectly (71) clear now I will receive no proof from any side on this question.

Mr. Krieger: That means your Honor would not take any testimony?

[fol. 158] The Court: That's right.

Mr. Krieger: I respectfully submit that it must appear clear from the moving papers that there is sufficient to connect or show that these people could possibly be involved in a criminal offense.

The Court: You are entitled to draw any conclusion you want to. The Court will draw its own.

Mr. Krieger: Otherwise, I would ask the right to put in testimony and proof, accordingly.

Now, if your Honor pleases, if I have succeeded in demonstrating to the Court the point of the Statute, of the privilege, the point of the immunity not being co-extensive, the point of the fact that there are implications here in this case, that the record is sufficient, as the Statute provides—if I have succeeded in doing that, that could terminate this matter.

* * * * * * *

[fol. 159] I have covered it very briefly, and again I repeat as distinctly as I possibly can that there is a failure [fol. 160] to apprise, that (75) there is a failure to show purpose, there is a failure as required by all of the Federal cases in this investigation. There is a complete failure in that respect.

In fact, throughout the testimony, your Honor will note there was constant questioning of the interrogator as to the purpose and pertinency. There is a constant attempt to elicit information. There is a constant demand for information relative to the matter, so the defendants could properly be advised as to their rights. That was not forthcoming at all during the entire interrogation.

* * * * * * *

I respectfully submit, also, Elkins versus United States, 364 U. S. 206, the Feldman case, as cited heretofore, and Mapp versus Ohio, supra.

[fol. 161] I don't know whether it is necessary to (77) take any time on a point they raised in their brief last night, in which they try to contend that this so-called immunity Statute must be interpreted as New York courts have interpreted it. I respectfully submit that under the

McNamara case now there can be no question that this is a State agency, that under the McNamara case now that this body, this body politic and corporate, is subject to the rules of evidence of the State of New Jersey, and this is a rule of evidence they can no longer escape, as they contended in the Supreme Court that they have sovereignty unto themselves, that they have a law unto themselves, that they have a right in this instance to grant immunity unto themselves regardless of the law of the State of New Jersey. They are subject to the rules of evidence. They are subject to our Statutes, in this instance, the evidence act. They are subect to it. The fact they can't grant Federal immunity has no bearing to the exercise of the use of privilege by the defendants in this instance when the Statute guarantees and grants them such a right.

(78) Other than the offer of proof I have indicated is necessary, I would like now to conclude my argument, because I have taken a great deal of time of the Court. The Court has been most patient with me. I have left out a great deal of my argument, but I don't want the record to show that I haven't urged it and, therefore, to save some time in this matter, I urge, if it is agreeable with counsel, that my brief as submitted and the statement of jurisdiction as submitted to the Court here and the other papers become part of this record as such, as if it had been stated orally. Is that agreeable?

Mr. Malchman: What papers?

Mr. Krieger: My moving papers.

Mr. Malchman: I'm not sure—

Mr. Krieger: You received copies of them.

Mr. Malchman: You want me to agree to what?

Mr. Krieger: That they are part of this record.

Mr. Malchman: Aren't they?

Mr. Krieger: I'm asking the Court to—

(79) Mr. Malchman: What papers?

Mr. Krieger: My original brief, my supplemental brief, the McNamara case which I submitted to the Court, and the statement of jurisdiction.

Mr. Malchman: I have no objection.

Mr. Krieger: And they will be considered part of this record as such.

Mr. Malchman: I have no objection.

The Court: They may be made part of the record, and I assume the petitioner would want to make his briefs a matter of record, too.

Mr. Malchman: Yes, your Honor.

The Court: Any objection to that?

Mr. Krieger: No, your Honor.

The Court: They may be marked.

Mr. Krieger: I think your Honor ruled your Honor is not permitting any evidence or proof?

The Court: Yes.

* * * * * * *

[fol. 166]

ARGUMENTS ON MOTION TO HOLD DEFENDANTS IN CIVIL AND CRIMINAL CONTEMPT

* * * * * * *

Mr. Malchman: If your Honor please, with respect to the contention by the defendants that they have not been granted immunity from Federal prosecution, I simply answer as a matter of law they are not entitled to it, but I will go beyond that answer, which I say is a (87) completely independent and self-sufficient answer to the point that there has been no and can be no showing, reasonable showing, of apprehension of prosecution under Federal law in this proceeding. With respect to this point, I would like to suggest that the defendants are playing fast and loose with this Court with regard to this matter.

For example, in the original contempt that we instituted in this court before your Honor, William Murphy, one of the defendants in this proceeding, swore to the truth of the following statement by his attorney, Robert H. Wall, and this statement appears on pages 7 and 8 of the Commission's reply memorandum, as follows:

"In conclusion, it is apparent that a labor dispute exists under full control of the United States Government National Labor Relations Board, and to allow the Waterfront Commission of the Port of New York to intermeddle would lead to the impairment of the existing contractual relationship between Labor and Management."

[fol. 167] So that we have one of the defendants in (88) the first contempt proceeding saying that there was nothing but a labor dispute, pure and simple, involved, and we didn't have any jurisdiction over that labor dispute because the National Labor Relations Board had jurisdiction. Now when we give him immunity from prosecution and after your judgment of contempt has been affirmed by the New Jersey Supreme Court, he comes back and speaks out of the other side of his mouth—not himself but through his counsel—and says there are all kinds of criminal activity involved herein and he might be incriminated under various Federal penal laws.

The same is even more true with respect to the defendant John Moody, who in his affidavit even denied that there was a work stoppage to force Mr. Markley off the piers of the American Export Line.

In this connection, with respect to the fact that I submit that the defendants are playing fast and loose with this Court and are taking expedient positions according to the record that they desire, the Supreme Court of New Jersey in a very recent decision has (89) stated and has held very clearly that before a defendant can avail himself of privilege against self-incrimination that defendant or witness must himself take the stand and swear under oath, under pain of perjury, that he fears that he may be incriminated if he testifies and he must pinpoint the area of fear of criminal involvement, so that the Court may intelligently rule upon this claim of incrimination, and this was held, your Honor, in the case In re Boiardi, which appears in our brief, reply memorandum, at page 4, and from which the following quotation appears, but before I read the quotation, I would just like to point out to your Honor that in that case—

• • • • • • •

[fol. 170] The Court: Do you desire to be heard further, Mr. Krieger?

Mr. Krieger: Yes.

To start with, counsel speaks about contradictions. I think if there has been any contradiction it has not been on the part of the defendants. As far as argument is concerned there have been consistent arguments.

Counsel in one breath says, "Yes, we can grant immunity." In the second breath he admits the immunity does not go to the Federal and they haven't got a right to do so. Practically, those are his words, in essence.

Then he says the reason why is because there has been no pinpointing of the area of possible incrimination. No pinpointing. I thought I had made myself quite clear, clear (95) as one could make himself, and said if there was any question about it we would have testimony to that effect and they would take the stand and indicate that they felt incriminated, and they would do so. I made that clear, and I make it clear again for the purpose of the record.

Mr. Malchman: If the Court please, is this an argument?

Mr. Krieger: Let me finish.

The Court: Please don't interrupt.

[fol. 171] Mr. Krieger: You've done that many times. Don't do it today.

The Court: I might say that this is the first time that I heard counsel—

Mr. Krieger: I'm not talking about today, in this court. In other courts. We have been in many courts in various cases and we know each other well.

I say that offer has been made. It is up to the Court now, if there is any question. I had argued I felt the record was sufficient to indicate from the Nusbaum case, and the Boiardi case, it appears on its face there is a distinction in this case from the Boiardi (96) case by far. I spent a great deal of time reading from the Boiardi case. The Boiardi case has no relationship here because in the Boiardi case it did not appear upon its face that there could be any kind of incrimination. In fact, the contrary appeared. The contention was perjury, not anything else. But, of course, if the record was going to be settled, it had to be settled by the testimony.

I say here if there is any question about that, the offer is made. I want that clear. I don't want anybody to say we didn't pinpoint it because we are ready to do so. I put that on the record, as part of the record in this case.

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[fol. 175]

ARGUMENT ON MOTION OF DEFENDANTS FOR JURY TRIAL

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Mr. Krieger: Yes, but I am attempting to pinpoint one item at a time of the argument before the Court—subsequent to an order made by the Court compelling the witness to answer. At the time the question came before the Court that the witness be compelled to answer, that argument was not made to the Court. It was only subsequent, after the appearance before the grand jury and after the order compelling him to answer that argument for the first time was made about the exercise of the use of privilege. Here, the first time after these people were ordered to answer they have exercised their privilege. It appears clearly and convincingly.

As I said before, I made the offer. I repeat my offer heretofore made so there can be no question of fact. I don't want to leave a question of fact open in this case.

I respectfully submit there should be a (104) dismissal.

The Court: Gentlemen, are there any other motions? As to the respondents' motion to quash the subpoenas, I suppose the same arguments are applicable?

Mr. Krieger: Yes, they are applicable to both.

The Court: And those two motions were consolidated.

Mr. Krieger: Yes, your Honor.

The Court: The next defendants' motion that I have is a demand for a jury trial in these proceedings for civil and criminal contempt.

"If the Court denies the motions for contempt or otherwise disposes of those motions favorably to the defendants on any of the grounds of law asserted in the defendants' answer to said motions, this demand for jury trial will become inoperative. It is the defendants' intention to request the Court to dispose first of all such issues of law, and further, if the motions for contempt are not denied on such [fol. 176] grounds of law, it is defendants' further intention to move that the trial of the issues of fact herein shall be deferred pending (105) completion of the discovery proceedings which the defendants shall seek herein pursuant to their motion for bill of particulars and their interrogatories."

I will hear you on that motion at this time.

Mr. Krieger: On the question, if your Honor please, for hearing of this matter on the criminal and/or civil contempt, this being an application for both, and trial thereof, I respectfully contend, under the rules of practice of civil and criminal contempt, respectively, provided for in R. R. 3:8 and R. R. 4:87—Rules of Criminal Practice, Part III of the Revised Rules especially provide for a bill of particulars. R. R. 3:4-6. On the face of the latter Rule, and in view of the fact that said Rule is contained in the same "Part" of the rules as is R. R. 3:8 (Criminal Contempt), a defendant in a proceeding for criminal contempt is entitled to move for a bill of particulars under R. R. 3:4-6. The latter rule refers not only to the "indictment" but also to the "accusation." The "accusation" in our case consists of the Commission's motion papers. Within the meaning of R. R. 3:4-6, this (106) "accusation" is not sufficiently specific to enable the defendants to prepare their defense. Our reasons for contending that the "accusation" is thus inadequate are set forth herein.

Under the closely comparable Federal Practice, it is settled that a defendant in a criminal contempt proceeding is entitled to move for a bill of particulars, the leading case being United States versus Balavan, 26 Federal Supplement 491, 498 (N. D. Ill. 1939), where the Court said:

> ". . . the analogy between a proceeding in criminal contempt and an indictment for a criminal offense is so compelling as to leave no doubt that, in a proper case, a bill of particulars may be exacted . . ."

In accord: United States versus French, 9 Federal Supplement 30-31 (W. D. Mich. 1934); Fox versus United [fol. 177] States, 77 Federal 2d 210-211 (C. C. A. 4 1935); Conley versus United States, 59 Federal 2nd 929, 935 (C. C. A. 8 1932).

As regards the civil contempt aspect of the Commission's motions for contempt in this case, we maintain that defendants are entitled to pretrial discovery by all appropriate (107) avenues made available under Part 4 of the Revised Rules of Civil Practice in the Superior Court. As above mentioned, the contempt proceedings herein insofar as they arise on the civil side must be conducted pursuant to R. R. 4:87; indeed, it would appear that the alleged contempts herein insofar as they arise on the criminal side also bring into play R. R. 4:87, inasmuch as the latter rule deals with both civil and criminal contempts. No reason is apparent to us, and we do not see how any could be suggested, that would justify denying to a defendant in a civil (or a civil and criminal contempt proceeding) under R. R. 4:87 the rights of pretrial discovery which are provided generally for all proceedings under Part 4 of the Revised Rules. In this case, the pretrial discovery which we seek on the civil side is by way of interrogatories.

In other words, in civil actions we are entitled to interrogatories. In criminal cases we are entitled to a bill of particulars. Therefore, that is the reason for having both.

The Court: You also have a motion to compel answers to interrogatories.

(108) Mr. Krieger: Your Honor, at the outset, your Honor recalls, your Honor said at the outset that your Honor would consider as part of the discovery argument today both the interrogatories as well as the bill of particulars. Although we didn't include our interrogatories with a notice of motion, we made the same returnable, and the notice of motion which your Honor just read from applies to both the interrogatories and the bill of particulars. We didn't separate them. We included them in the one motion paper.

The Court: Well, the interrogatories you seek are identical with the bill of particulars.

[fol. 178] Mr. Krieger: Identical, sir. I say very frankly the Court may determine if they answer the interrogatories they don't have to answer the bill of particulars, because the interrogatories are under oath. They don't need to answer the bill of particulars because the interrogatories cover it.

On the other hand, if your Honor should find there is no criminal contempt involved at all, then under the civil contempt the bill of (109) particulars comes into play, or vice versa, and I say in the moving papers that a single set of answers to either one will suffice, will cover both discovery requests.

Why are we entitled to such discovery? The New Jersey Rules of Evidence adopted in 1960 provide (N. J. S. A. 2A:84A-32, Rule 40, para. (2)) that:

> "(2) If a witness refused to answer a question, under color of a privilege claimed pursuant to Rules 23 through 38, after the judge had ordered the witness to answer, and a contempt proceeding is brought against the witness, the court hearing the same shall order it dismissed if it appears that the order directing the witness to answer was erroneous."

The defendants herein contend that the Commission's orders of immunity directing them to answer were erroneous within the meaning of the above quoted statute and Rule, and I say, your Honor, at this time it apears so conclusively that it is erroneous that the Commission itself at the time of the hearing never ruled that the defendants were entitled to immunity insofar as the 1960 law involving a (110) Federal crime or Federal offense. They were under a misapprehension of the law. They felt the rule existed and was not changed and that the cases which held that there was no necessity of immunity being granted as far as Federal offenses still persist, and, first of all, they weren't aware of the 1960 Statute, because no motion was made. In fact, they said, "We can't grant you Federal immunity." So they never ruled on it themselves. They erroneously [fol. 179] made that order, because I am sure no judicial body could have made an order under those circumstances to answer.

The immunity orders were erroneous for the several reasons argued heretofore, and we have separate defenses in our answer. Your Honor will take into consideration there has been an answer filed in this cause creating these issues and setting up affirmative defenses.

In other words, if we are correct in our argument that the Commission pressured and maneuvered the defendants into an alleged contempt by conducting the interrogation and the proceedings for conferral of immunity in a (111) manner contrary to due process or in violation of Statute, then the defendants are not in contempt because the orders directing them to answer are erroneous. In nearly every facet of this case a full and fair determination as to the validity or erroneousness of the orders to testify entails a substantial further judicial inquiry of fact.

There is no question that this is a trial or a trial can be set by the Court, and if we are to have a trial we are surely entitled to be prepared for such a trial. Issues are presented here which are issues of law. Then we get down to issues of fact, because the Court must determine whether or not there was a criminal contempt. The Court must determine whether or not there was a civil contempt. The Court must interpret the question of intent, which is a factual situation or a jury question.

Therefore, if your Honor please, pretrial discovery is permitted, just as in the McNamara case, if you notice how far our Supreme Court goes now. They have gone further than in the Johnson case. Originally, in the (112) Johnson case they went into the examination by pretrial discovery of a statement given by an individual, right of examination, and they specifically say in any criminal case there may be pretrial discovery and you can have pretrial discovery in a criminal case, and the McNamara case clears that up completely now, because the reason for it is there can be nothing [fol. 180] hidden, all facts will appear, and the case will be plainly and clearly before any court, and the defendant will not be deprived of any right.

That is the reason why I say we are entitled to this, and I say the Rules provide for it. I don't want to take any further time of the Court, because the Rules provide for it. I have not been served with any brief by my opponents on this question at all. I have received no brief from them at all. I submitted our brief way back last Thursday, five days ago, as required by the Rule. I have received no answering brief at all. I don't know what their argument may be in answer. I don't know if they want to contend we are not entitled to it or not. I don't know.

(113) As far as the right to trial by jury, that also is provided by the Rules, sir.

I have nothing further.

The Court: It is a matter of discretion with the Court.

* * * * * * *

[fol. 182] Mr. Malchman: I hope your Honor will bear with me just a minute. I don't want to impose upon your Honor. Just for the purpose of clarity of the record, I am sure that your Honor is not saying to counsel for the defendants that he will not hear the defendants state under oath that they fear incrimination under any law.

The Court: I have made it very clear that this Court is not going to receive any testimony. I'm going to decide it on the record as I've got it.

We will carry this over until 12 o'clock tomorrow morning, gentlemen. We will recess until 12 o'clock tomorrow morning.

[fol. 183] COLLOQUY

(118) November 22, 1961.

(Appearances the same with the exception of Mr. Pin, absent.)

The Court: The Court has reconsidered the offer made in behalf of the respondents, Messrs. Murphy and Moody, to offer testimony. I concluded that I will receive such testimony now, if you desire to offer it, from those witnesses, or respondents.

Mr. Krieger: Of course, this will be in a very limited sense and for a very limited purpose. As I understand it now, the offer is being accepted only to pinpoint the Federal involvement or the Federal statute, the Federal crime, they could possibly be involved in and the reasons therefor in that respect.

The Court: That's right.

Mr. Krieger: And only insofar as the incrimination, because the Boiardo case says specifically it must be specifically limited.

The Court: That's right. The Waterfront Commission has also in their brief and in their argument yesterday, oral argument, they seemed to join with you in saying it was (119) proper that testimony should be received. They have no objection to it.

Mr. Krieger: The reason why I offered it—I said only in the event that the Court felt the record was not complete enough in that respect, and for that purpose and that purpose only.

The Court: Well, it is for you to determine, counsel. You made the offer and the Court now grants you permission to do so.

Mr. Krieger: Your Honor probably doesn't follow me. I said if the record itself didn't disclose the Federal offenses, the possibility of Federal offenses and incrimination, therefore, under the circumstances, to complete the record in that respect and pinpoint it, it is being offered for that purpose and that purpose only.

[fol. 184] The Court: You told me that this morning and you told me that yesterday, and that is why I say it is being accepted.

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(120) William Murphy, sworn.

Direct examination.

By Mr. Krieger:

Q. Mr. Murphy, you have heretofore been subpoenaed as a witness to testify before the Waterfront Commission of New York Harbor and you appeared in response to such subpoena; is that correct?

A. That's right.

Q. And, Mr. Murphy, you did exercise the right of privilege under the statutory provisions of the State of New Jersey and the Constitution of the United States of America; is that correct?

A. Yes.

Q. You exercised the privilege and you stated in your answer thereto that you refused to answer because it may tend to incriminate you, the answers may incriminate you; is that correct?

A. That's right.

Q. Mr. Murphy, you were made aware of the fact that this investigation was to investigate crimes that were being committed on the waterfront in the City of Hoboken, County of Hudson, State of New Jersey, on or about May 20, 1960; is that correct?

A. That's right.

Q. Or May 16, 1960; is that correct?

A. That's right.

(121) The Court: That wasn't the only purpose of the investigation.

Mr. Krieger: That was one of the purposes.

The Court: I wish you would say so.

Q. Another purpose, as I understood from the investigation as indicated in the questioning, Mr. Murphy, was the fact that it was the contention of the Waterfront Commission that a chief security officer—another purpose of the investigation, as I understand it, was that it was the desire [fol. 185] of you and others in a combination or group to cause a work stoppage to prevent an individual from employment and secure his discharge from employment, namely, one Markley; is that correct?

A. That's right.

The Court: Will you please—

Q. As I understand it further, that the Waterfront Commission had contended that the watchmen were under the jurisdiction of the Waterfront Commission as a result of thievery and other acts—

Mr. Malchman: I object to that. We have not made such a contention.

Mr. Krieger: I'll read it in the record. I'll read from the record, paragraph 3 of the affidavit of Mr. Sirignano, on page 2, that the ILA controlled the—

(122) The Court: What affidavit is that?

Mr. Krieger: Mr. Sirignano, general counsel of the Waterfront Commission.

The Court: What is it in reference to?

Mr. Krieger: Stating the reasons for this investigation, your Honor.

The Court: What was the affidavit in connection with?

Mr. Krieger: An affidavit in connection with this situation here in this matter.

The Court: That is what I want to know.

Mr. Krieger: In this matter here, filed in this cause. "—was that the ILA controlled the Port Watchmen's Union; that the close connection between the watchmen's union and the ILA resulted in watchmen being discouraged from, and even reprimanded for, reporting thieves; and that the ILA actively opposed efforts by steamship companies to improve the watchmen system."

Mr. Malchman: If the Court please, that paragraph is a quotation from the Crime Commission report in 1953 and [fol: 186] it was only in the affidavit to show why, in the first instance, legislation was passed requiring port (123) watchmen to be licensed by the Commission. However, it was never stated in any of the moving papers before this Court that this investigation by the Commission was for the purpose of investigating thievery on the waterfront. Rather, it was specifically stated that the purpose of this investigation was for the purpose of inquiring into a work stoppage to keep one James Markley off the piers of the American Export Lines in Hoboken.

The Court: Counsel, that is in an affidavit filed in the present petition. You have got to confine your questions to what was before him at the time he claimed his immunity. This is subsequent to it. This is only filed lately. I'll not allow it.

Mr. Krieger: For the purpose of the record, may I point out to the Court, as I have indicated heretofore in my argument—

The Court: Counsel, I don't want reargument. I've had all the argument I want. I'm not going to have any more argument. It's repetitious. I've had plenty of it.

Q. Mr. Murphy, the American Export Lines owns or (124) operates the pier in Hoboken?

A. That's right.

Q. That pier in Hoboken, is that engaged in interstate commerce?

A. That's right.

Q. Now, Mr. Murphy, in the exercise of your statutory and constitutional rights, is there any question in your mind as to whether or not you could possibly incriminate yourself by any evidence at all?

A. I could.

Q. What crimes could you possibly have been connected with as to result in a Federal charge against you or others, in combination with others, in conspiracy with others?

A. That the American Export Lines is subsidized by the [fol. 187] United States Government and could be sued, the union could be sued, and I could be sued, personally. Interstate commerce freight that was held up during the strike would bring in the Federal Bureau of Investigation, and the rights of watchmen working on the piers that could be in cahoots in pilferages, and stuff like that.

Q. Also, were you aware of the fact it was the contention of the Waterfront Commission that you tried, and others together, in combination and conspiracy, to keep an individual from employment on the piers, namely, Mr. Markley?

A. That's right.

Q. And was that a reason for your exercising that (125) privilege, yourself?

A. That's right.

Q. You have been made aware of the fact, Mr. Murphy, have you not, that this would constitute Federal offenses or could possibly involve Federal offenses; is that correct?

A. That's right.

Mr. Krieger: That's all.

Cross examination.

By Mr. Malchman;

Q. Now, Mr. Murphy, were you a respondent in a contempt proceeding instituted in this court in or about May of 1960?

Mr. Krieger: Just a minute. I object to the question, if the Court please. That is not the purpose of this witness that is being called here. The question is as to his examination at this time, not what happened in an examination in May of 1960.

Mr. Malchman: I ask that it be taken subject to connection.

Mr. Krieger: I object. It can't be connected up, and it is very limited, in accordance with the Boiardo case.

The Court: I'll allow it. It is proper cross-examination on the question.

[fol. 188] (126) Mr. Krieger: It's not cross-examination.

The Court: I say it is, counsel. I have ruled it is proper cross-examination.

Mr. Krieger: Your Honor please—

The Court: It doesn't need to be connected up. If you read the pleadings you would know what it is about.

Mr. Malchman: That's right.

Mr. Krieger: If your Honor wants to consult with counsel, I would like an opportunity.

The Court: No, I will have no consultation with counsel in this court on this question, and I will allow it, and I direct the witness to answer the question. I will have no further delay. Let's get on with this.

Read the question.

(The reporter read the last question.)

A. I stand on my constitutional rights on this question.

The Court: You don't stand on any constitutional rights on that question. I order you to answer that question.

Mr. Krieger: Answer it.

The Court: I'm not so stupid, when I sat here and presided in that case, that I don't know you were here, and you know you (127) were here.

Mr. Krieger: The only question is the opening of the door. That's the only question.

The Court: I want you to answer it yes or no.

Mr. Krieger: Answer it yes or no.

A. Yes.

Q. And in that contempt proceeding instituted against you by the Commission, did you swear to the truth of a statement executed by your attorney then representing you, Mr. Robert H. Wall?

[fol. 189] Mr. Krieger: He can't answer that. How does he know what the statement is, your Honor, unless he is advised?

The Court: Sustain the objection.

Q. Mr. Murphy, I read to you a paragraph from a statement by Mr. Robert H. Wall which appears in the printed record of the first proceeding, in which he states the following—

Mr. Wall: I object to that question being asked on this ground: That affidavit was put in the record as to one subject that was being contested at that time, the jurisdiction of the Commission, and the affidavit in no wise encompassed the privilege or (128) concerned this immunity, and it is absolutely irrelevant at this time.

The Court: I'll allow it.

Q. In which your attorney, Mr. Wall, made the following statement: "In conclusion, it is apparent that a labor dispute exists under full control of the United States Government National Labor Relations Board, and to allow the Waterfront Commission of the Port of New York to intermeddle would lead to the impairment of the existing contractual relationship between labor and management." Now, Mr. Murphy, did you swear to the truth of that statement by your attorney, Mr. Wall?

Mr. Krieger: How could he swear to the truth of a statement made by an attorney, your Honor? That is improper. He is quoting from a statement made by a lawyer, not by a witness. The most that could be said is that a witness or an individual in litigation may have an affidavit insofar as to his knowledge or information or belief. In other words, first a complaint is made and the complaint is signed by an [fol. 190] attorney, and affirmation by the party to the action as to information and belief, and that is all that could be involved, but not an affidavit by this individual, and (129) he is not reading from a statement by this individual. He is reading from a statement made by an attorney in argument of a question before a court of jurisdiction.

The Court: Are you reading from an affidavit?

Mr. Malchman: I am reading from a statement by Mr. Wall which was sworn to by Mr. Murphy. He swore to the truth of the facts set forth in this statement by Mr. Wall.

Mr. Krieger: That is not a fact.

The Court: How did he swear to it?

Mr. Malchman: He said as follows, and this appears in the printed record:

"William Murphy, of full age, being duly sworn according to law, upon his oath deposes and says:

"1. I am Business Agent of Local 2 of the International Longshoremen's Association.

"2. The facts and matters set forth in the foregoing Answering Statement are true, to the best of my knowledge and belief."

That is the answering statement of Mr. Wall.

"Signed, William Murphy.

"Subscribed and sworn to before me this (129A) 25th day of May, 1960, Joan M. Hogan, Notary Public, New Jersey."

So he swore in the first action that we instituted to the truth of that statement by Mr. Wall.

Mr. Wall: May I say, your Honor, this is an affidavit in answer to an affidavit filed by the Waterfront Commission and it was absolutely pointed at that affidavit and did not encompass all this man's rights. Therefore, it is highly improper at this time to try to impress upon the Court that this affidavit was made to answer everything that is involved in this issue today, and that is my objection.

[fol. 191] Mr. Krieger: I make an additional objection that this is an answer filed, an answer filed by an attorney in which an acknowledgment appears thereon, an affirmation appears in the cause, by information and belief, and if Mr. Malchman wishes to examine on that information, the man to examine would be Mr. Wall and not Mr. Murphy.

Mr. Malchman: We have this situation. We have a sworn statement on file in this (130) court that the labor dispute here was nothing but a labor dispute within the cognizance of the National Labor Relations Board, and all I am asking this witness at this time is whether he swore to the truth of that statement. I think I am entitled to it in view of his subsequent inconsistent statement that he thinks he will now be incriminated.

Mr. Wall: This is not inconsistent.

Mr. Malchman: This goes to the good faith of his plea, your Honor.

Mr. Wall: That is exactly the point I am trying to make before this Court. This statement that was made was made to answer an affidavit filed by Mr. Sirignano and was not made to encompass all this man's rights. It was not made to encompass every fact in the case. It was narrowed down to the issue that we were arguing before this Court concerning a labor dispute, to show that a labor dispute is under the control of the NLRB and under a pre-emption, that the Waterfront Commission did not have any jurisdiction, and we did not encompass the rest of this case. That was our point, and in accordance with the rules, we (131) narrowed it down to the point. I think it is highly irrelevant, highly improper, and highly inequitable to try to narrow that down at this point.

[fol. 192] Mr. Krieger: And the Court held it was a labor dispute, so that issue was disposed of as far as jurisdiction is concerned.

Mr. Malchman: We have a sworn statement by this man as to what the work stoppage was about in 1960. He now comes on the stand and says he fears he may incriminate himself.

The Court: This man is under cross-examination. It is perfectly proper. I will allow it.

Mr. Krieger: If I may be heard—

Mr. Malchman: I think the Court has ruled.

Mr. Krieger: In accordance with the Rules, I think that this man's cross-examination is narrowed down to the issue that was brought out by direct examination. If that be so, nobody said anything about an affidavit on direct. I think he is going outside the bounds and limits of proper cross-examination.

The Court: It is proper cross-examination.

(132) Mr. Krieger: May I point this out? The Supreme Court was very careful in this type of examination and said it must be limited and very narrow and, if the Court please, only to pinpoint the offenses, only to pinpoint the offenses, and to compel this witness to go into other matters, other than pinpointing the offense itself, would be—

The Court: This is offered to affect his credibility as to his intention.

Mr. Malchman: That is right. That is what I am trying to do.

The Court: Perfectly proper cross-examination.

Mr. Krieger: Excepting this: Credibility is not an issue in this type of examination.

The Court: Of course, it is. Every witness who is called to the stand, his credibility is in issue.

[fol. 193] Mr. Krieger: The question is whether or not there exists such offenses that he could possibly be incriminated in; whether there exists such offenses, not whether he was there or not.

The Court: Whether he claims his immunity (133) on account of the fear of those offenses.

Mr. Krieger: Yes, that's right, and, consequently, if your Honor please, not what the facts were, not what the facts are. None of the facts can come into play at all. To do so would deprive him of the provision of the statute of using privilege.

The Court: I'll allow it.

Mr. Wall: May I just state one more thing? The only point here on cross-examination, the only credibility to be attacked is as to whether or not he actually believes that he will subject himself to a Federal offense.

Mr. Krieger: Or a possibility.

Mr. Wall: Or if there is a possibility. There is nothing else offered here. Why attack credibility on something that happened five years ago?

The Court: I will allow the question.

Read the question.

(The reporter read the pending question.)

Mr. Wall: May I say one more thing? Don't you believe that the proper way to do this is show him the original statement and ask him if that is his signature? How can (134) this man remember what he did three or four years ago? Don't you think the—

The Court: Counsel, you are very clever. You are giving him the answer.

Mr. Wall: No, I'm not giving him the answer.

The Court: You just gave him the answer. I have allowed the question.

[fol. 194] Mr. Krieger: May I show you something?

The Court: If you want to read me something, read it to me. After the question is answered you can read it.

A. Your Honor, I don't recall signing any statement.

Q. Is it your testimony that you didn't sign any statement or you don't remember?

The Court: Are you speaking of an affidavit or a statement, counsel?

Mr. Malchman: I am speaking of an affidavit.

The Court: Why don't you say so?

Q. Is it your testimony that you never executed an affidavit or that you don't remember whether or not you executed an affidavit?

A. I don't recall.

Mr. Malchman: I would like to have the production of the papers from the first proceeding, (135) your Honor.

The Court: I don't know whether it is in my file or the County Clerk's file or whether he has any other file. Maybe it's in Trenton, for all I know. I don't know where they are.

Mr. Krieger: While counsel is looking for it, may I read this, sir?

The Court: What are you reading from?

Mr. Krieger: I am reading the Supreme Court's opinion in re Boiardo.

Mr. Malchman: I have it here, your Honor.

Mr. Krieger: The Court asked me to read—

The Court: I've read the Boiardo case so often.

(To Mr. Malchman): Are you offering that?

Mr. Malchman: I would like to have this marked for identification, please.

[fol. 195] The Court: Are you offering it in evidence or for identification?

Mr. Malchman: For identification.

(Document referred to marked Exhibit C-1 for identification.)

Q. I show you, Mr. Murphy, what purports to be—

The Court: Please refer to the marking (136) on your exhibit in your inquiry.

Q. I show you Commission's Exhibit Number 1, Mr. Murphy, which purports to be an answering statement of your attorney, Mr. Wall, and I also show you annexed thereto what purports to be—

Mr. Wall: I object to "what purports to be." Who made the statement?

The Court: Counsel, will you please wait until I have a question before you interpose an objection? How can I pass on a question when I haven't got a question?

Mr. Wall: He said it is to the other question.

The Court: Will you please be seated?

Q. —purports to be an affidavit executed by you. Now, Mr. Murphy, I am going to ask you to read this—

The Court: Please show it to him and ask him if that is his signature.

Q. Is that your signature, Mr. Murphy?

A. It is.

Q. Would you hold the exhibit, please? Does that refresh your recollection, Mr. Murphy, as to whether or not you executed an affidavit in the first contempt proceeding instituted by the Commission against you?

Mr. Krieger: If the Court please, I (137) object. That [fol. 196] is not an affidavit. That is an affirmation to an answer, sir, and therein lies a distinction and difference.

The Court: What is it, counsel?

Mr. Malchman: It is an affidavit.

The Court: What is this statement?

Mr. Malchman: It is an affidavit.

Mr. Krieger: It is an affirmation, is it not, Mr. Malchman?

Mr. Malchman: No, it is not.

The Court: Will you read it to me, counsel, what it is?

Mr. Krieger: Read the title of the paper.

The Court: Read me what he signed, the whole thing.

Mr. Malchman: "State of New Jersey, County of Hudson, SS:

"William Murphy, of full age, being duly sworn according to law, upon his oath deposes and says:

"1. I am Business Agent of Local 2 of the International Longshoremen's Association.

"2. The facts and matters set forth in the foregoing Answering Statement are true (138) to the best of my knowledge and belief.

"Signed, William Murphy.

"Subscribed and sworn to before me this 25th day of May, 1960, Joan M. Hogan, Notary Public of New Jersey."

Mr. Krieger: May I say, if your Honor please, so the record is clear, this is an answer filed by an attorney and what counsel is reading from is an affirmation.

The Court: Do you know an affidavit when you see it, counsel?

Mr. Krieger: Sure, I do.

The Court: Is that an affidavit that he just read?

[fol. 197] Mr. Krieger: It is an affidavit of affirmation.

The Court: Is that an affidavit he just read?

Mr. Krieger: It is an affidavit of affirmation.

The Court: That is all I want to know.

Mr. Krieger: Of affirmation.

The Court: I don't know what you are talking about. I don't know what "affirmation" is. That is an affidavit. You say so, yourself. (139) I don't want you to try to mislead this Court.

Mr. Krieger: I'm not. I will never mislead this Court.

The Court: You were trying to tell us before he read it that it was not an affidavit; it was an affirmation.

Mr. Krieger: There is a distinction. This is not this man's affidavit.

The Court: I don't want to hear anything more on it. It is not his affidavit?

Mr. Krieger: No. I don't think it is an affidavit as such.

The Court: Why not?

Mr. Krieger: It is a statement by Mr. Wall. So you will see it for yourself and you know what we are talking about, it is a statement by Mr. Wall, signed by an attorney, his answer, and annexed thereto is an affirmation of the answer, as required by the Rules.

The Court: In the form of an affidavit.

Mr. Krieger: In the form of an affidavit, but an affirmation.

The Court: All right. Proceed.

Mr. Malchman: May I have the last question read back, please?

(140) (The reporter read the last question.)

A. I answered this. It's my signature.

[fol. 198] By the Court:

Q. Will you please answer the question?

A. It's true.

By Mr. Malchman:

Q. Now, was that statement to which you swore, Mr. Murphy, namely, that it is apparent that a labor dispute exists under the full control of the United States National Labor Relations Board—was that statement true at the time you swore to its truth?

Mr. Krieger: If the Court please, I object to that.

The Court: I will sustain the objection. It speaks for itself.

Q. Now, Mr. Murphy, is it now your testimony today that you fear you may incriminate yourself under a Federal penal law if you answer questions put to you by the Commission in this investigation?

A. It is.

Q. And is it your testimony, Mr. Murphy, that you fear that you may incriminate yourself under a Federal penal law that forbids theft from interstate commerce?

A. Accusations that were said, it does.

Q. Which accusations are you referring to?

A. Articles that were published in the newspaper.

(141) Mr. Krieger: I object. We are doing exactly what the Supreme Court said can't be done.

The Court: I'll allow it. It is proper cross-examination.

Mr. Krieger: May I at this time point out the law, for the record?

The Court: You have already read it. You are referring and relying upon the Boiardo case?

Mr. Krieger: Yes, but this particular portion thereof is so important.

[fol. 199] The Court: You may read it.

Mr. Krieger: If I may, with your Honor's permission:

"The area must be pinpointed to the extent to which it is possible to do so—" possible to do so, meaning the involvement—"without eliciting a hurtful answer. Here, if the witness truly feared involvement in the shooting, he could have so stated without implicating himself in the least."

In other words, the point I bring out, the limitation of the questioning must be such and limited to the point where he cannot be (142) placed in a position where a hurtful answer could be required from him.

The Court: I've allowed the question. I've already ruled I will allow the question. It is proper cross-examination.

Mr. Malchman: May I have the last question read?

(The reporter read the last question and answer.)

Q. What articles in the newspaper?

A. Well, to point them out—it's been in the newspapers ever since that strike started—released by the Waterfront Commission.

Q. There have been articles in the newspaper respecting theft from interstate commerce?

A. Ridiculing me as a union official of pilferage, gangsterism, all released by the Waterfront Commission.

Q. Are you saying, Mr. Murphy, that there was a press release by the Waterfront Commission accusing you in connection with the work stoppage in May, 1960, of theft from interstate commerce?

A. I say there was a press release accusing me of having a part with others in this work stoppage.

[fol. 200] Q. And that was a press release; right?

A. It was in the paper.

(143) Q. And that is your basis for your fear that you may incriminate yourself?

A. That, and the release that was in the paper from people of the American Export Line that they were going to sue.

Q. Going to sue you for what? Breach of contract?
A. That's right.
Q. And that is your basis today for fear you may incriminate yourself?

Mr. Krieger: I object to that because the witness gave several reasons and counsel tries to limit it to a reason.
The Court: It is proper cross-examination. I'll allow it.

A. Would you mind repeating the question?

(The reporter read the last question.)

A. As knowing the Waterfront Commission, that's my basis.

The Court: Would you read that answer?

(The reporter read the last answer.)

Q. Mr. Murphy, is there any other Federal penal law as to which you may fear you may incriminate yourself if you are required to testify before the Commission, other than theft from interstate commerce?
A. Well, the Export being subsidized. The strike. Being subsidized by the United States Government, where I can be sued and the union can be sued.
(144) Q. Is there any other basis?
A. Offhand, right now, that's all.

Mr. Malchman: No further questions.

[fol. 201] Redirect examination.

By Mr. Krieger:

Q. You did testify keeping this man Markley—

Mr. Malchman: I object to leading questions at this time.
Mr. Krieger: I have a right to—
Mr. Malchman: I didn't object the first time.
The Court: I have no question.

Q. Mr. Murphy, you did testify keeping Markley off the waterfront, as contended in this investigation, was one of your reasons, too, in depriving him of his job? Is that still your answer?

A. That's right.

Mr. Krieger: Thank you.

Mr. Malchman: No further questions.

(Witness excused.)

Mr. Malchman: Is Mr. Moody going to take the stand?

Mr. Krieger: Your Honor, to save time, we can have a stipulation that Moody's testimony will be in accordance with Murphy's (145) testimony, if your Honor please. We can save time in calling him.

The Court: I have nothing to do with that.

Mr. Malchman: There will be no such stipulation, your Honor.

Mr. Krieger: Allow me one moment, then.

John Moody, sworn.

Direct examination.

By Mr. Krieger:

Q. Mr. Moody, you were called in response to a subpoena that was issued to you to appear before the Waterfront Commission and did so appear; is that correct?

A. Yes.

[fol. 202] Q. As a result of which we presently have these contempt proceedings; is that correct?

A. That's right.

Q. You are connected as an officer with the International Union, is that correct, or an organizer?

A. That's right.

Q. And you are stationed in the city of Hoboken, State of New Jersey?

A. That's right.

Q. In your capacity, Mr. Moody, the pier of the American Export Lines is under your jurisdiction; is (146) that correct?

A. That's right.

Q. You did exercise a privilege under the Statute of the State of New Jersey and also the Constitution of the United States that you could possibly incriminate yourself if you were compelled to answer these questions relative to the strike, to dispose of one Markley or prevent one Markley from working on the piers? Do you recall that?

A. That's right.

Q. And, Mr. Moody, you were served with various papers in these proceedings and did attend the hearing in which the examination took place and in which the Waterfront Commission stated they were investigating this illegal action; is that correct?

A. That's right.

Q. Your reasons for exercising—the American Export Line is engaged in interstate commerce, are they, Mr. Moody?

A. That's right.

Q. You have been employed around this waterfront for how many years?

A. Around forty years.

Q. You know of your own knowledge that ships come in from all parts of the world there?

A. That's right.

Q. You were aware of the fact that the Waterfront Commission was investigating a stoppage that took place on May 16, 1960, or around that time?

A. That's right.

Q. You are aware of the fact that the Waterfront Commission contended that this was an illegal stoppage?

A. That's right.

Q. Mr. Moody, you were subpoenaed to answer several questions or a number of questions relative to that illegal [fol. 203] action that they contended that they had; is that correct?

A. That's right.

Q. And you exercised your privilege as you have just testified out of fear of incrimination of any Federal laws?

A. That's right.

Q. Will you tell the Court what you feared and pinpoint them and the respect?

A. First, from the Waterfront Commission, they have, what they say, the right and authority to question. Now, there's, we say, pilferage, that they say, work stoppage, we had to do with the pilferage and we had to do with the work stoppage; and the watchmen being not in the ILA, outside the ILA, that we tried to tell the watchmen what to do and what not to do, and to stop this one gentleman from getting hired on the pier. We don't do that, your Honor.

Q. You're not being asked that. You're being asked the reason for your exercise of the privilege, not what you do and what you don't do.

Mr. Krieger: I ask that portion of the (148) answer, "We don't do that," be stricken from the record.

The Court: No. I'll let it stand.

Q. You have just testified that the American Export Lines are engaged in interstate commerce; is that correct?

A. That's right.

Q. And that this stoppage, as contended by the Waterfront Commission was an illegal stoppage, was an interference with interstate commerce?

A. That's right.

Q. And is that why you fear incrimination?

A. That's right.

Q. And that it could lead to other evidence and tend to lead to other evidence that could possibly incriminate you?

A. That's right.

Q. You are not a lawyer, Mr. Moody, are you?

A. No, sir.

Mr. Krieger: That's all.

[fol. 204]. Cross examination.

By Mr. Malchman:

Q. Mr. Moody, were you a respondent or a defendant in a contempt proceeding instituted against you by the Waterfront Commission in this court in or about May of 1960?

(149) Mr. Krieger: I object to the question, your Honor, as to its relevancy in this subject matter.

The Court: I'll allow it.

Mr. Malchman: May I have the question read?

(The reporter read the last question.)

A. I don't follow you, actually. What proceeding? What are you talking about there? Are you talking about I was brought into this court? I was brought into this court, yes, sir.

Mr. Krieger: You will have to speak louder so the learned judge can hear you.

The Witness: I will.

Q. Did you execute an affidavit in that first proceeding?

A. An affidavit?

Q. Yes.

A. What do you mean, an affidavit?

Q. Did you sign your name before a Notary Public?

A. No, sir.

Q. On a paper?

A. No, sir.

Q. You didn't?

A. No, sir.

Q. You are pretty sure about that?

A. I'm darn positive.

Mr. Malchman: Incidentally, your Honor, may I have Commission's Exhibit for identification (150) C-1 received in evidence?

Mr. Krieger: I object to it.

The Court: Wait until you are through with the witness.

Mr. Krieger: This was in connection with the prior witness. I didn't offer it.

[fol. 205] The Court: You mean the other witness?

Mr. Malchman: Yes.

The Court: Offer it in evidence.

Mr. Malchman: I would like to offer it in evidence.

Mr. Krieger: I object to it on the ground it is part of the record of a prior proceeding and is not proper evidence in this proceeding.

The Court: I'll allow it.

Mr. Krieger: It can only be prejudicial in this case.

The Court: Let it be marked in evidence.

(Exhibit C-1 for identification received in evidence as Exhibit C-1.)

Mr. Malchman: May I have this marked for identification, please?

(Document referred to marked Exhibit C-2 for identification.)

(151) Mr. Krieger: I would like to show this to the Court.

The Court: I don't care to look at it. I have nothing before me.

Mr. Krieger: O. K.; all right.

Q. I show you, sir, Commission's Exhibit Number 2 for identification and ask you whether that is your signature. Take it, please.

A. Yes, that's my signature. That's it.

Q. Now, sir, I ask you whether in this affidavit you did or did not deny the allegation of paragraph 9 of the motion papers filed herein.

Mr. Krieger: It speaks for itself, your Honor. He's admitted he signed it. It's his affidavit in that respect.

[fol. 206] The Court: I'll allow it. He may answer.

A. Yes, sir.

The Court: You may read it, please.

Mr. Malchman: I ask that this be marked for identification.

The Court: First, let's get an answer to that question.

A. Yes.

The Court: What is the answer?

Mr. Malchman: Yes.

(152) The Witness: That's my signature.

Mr. Malchman: I offer this in evidence, your Honor, as Commission's Exhibit Number 2.

Mr. Krieger: I object to it on the ground it has no relevancy. It is not in any way related to the subject matter before the Court. It is simply an answer in denial of the allegations of the motion papers. That is why I asked your Honor to see it before. Now that it is being offered, I respectfully request your Honor to examine it.

The Court: What is paragraph 9?

Mr. Malchman: Paragraph 9 of the Commission's motion papers, and I am going to ask that the Commission's motion papers be marked for identification.

Mr. Krieger: The Judge asked a question.

The Court: I'll reserve my ruling on that offer. Please proceed.

Mr. Malchman: Paragraph 9 reads as follows:

The Court: No, no. What is it you are now marking for identification?

Mr. Malchman: This is Commission's Exhibit Number 3, which is the Commission's (153) original motion paper herein to punish this witness for contempt.

[fol. 207] The Court: In the present action?

Mr. Malchman: No, in the first proceeding in May of 1960.

(Document referred to marked Commission's Exhibit Number 3 for identification.)

Mr. Krieger: I object to it for this reason, because that proceeding is terminated now.

Mr. Malchman: Paragraph 9 of Commission's Exhibit Number 3 reads as follows, your Honor, and this is the paragraph which was denied by the witness in that first proceeding:

"The Waterfront Commission has information that this work stoppage is a concerted effort to keep James H. Markley off the piers of the American Export Lines in Hoboken, New Jersey. Accordingly, in order to determine whether this work stoppage constituted an illegal coercion of an employer (The American Export Lines) to compel such employer to limit the functions of, or to discharge, a licensed port watchman (James H. Markley) and to further determine whether any persons registered or (154) licensed by the Waterfront Commission are participating in such illegal coercion, the Commission instituted the instant investigation."

The Court: What does the affidavit say?

Mr. Malchman: It denies the truth—

The Court: Read it.

Mr. Malchman: "I deny the allegations of paragraphs 5 and 9 of the motion papers filed herein," and I just got through reading to your Honor paragraph 9.

Mr. Krieger: These proceedings were instituted in 1960. We're not talking about the proceedings today. We're talking about the 1960 proceedings. There were allegations made, and the fact is, if anything, these allegations now [fol. 208] prove my point that I make in this case today, because in this allegation of paragraph 9 the Waterfront Commission has information that this work stoppage—in other words, they admit they have such information—was an illegal act, an illegal coercion, and this is their allegation. All this man did, in an answer filed, he denies that they have such information as far as he is concerned.

The Court: What is the purpose of this (155) offer?

Mr. Malchman: Because this witness in the original contempt proceeding denied under oath that there was even a work stoppage to keep Mr. Markley off the pier.

Mr. Krieger: He could deny there was an illegal work stoppage. The Waterfront Commission said it was an illegal work stoppage.

The Court: I'll sustain the objection.

Q. Now, Mr. Moody, I would like you to tell me whether there is any Federal penal law as to which you may fear you will incriminate yourself if you answer questions in this investigation before the Waterfront Commission.

Mr. Krieger: Your Honor, the witness is not a lawyer. He cannot tell what the Federal penal law might be. He can only tell them what areas and pinpoint what areas he can possibly be implicated.

The Court: I'll allow the question.

Read the question.

(The reporter read the last question.)

A. First, the one work stoppage, or any cargo that comes into the United States on a ship is ICC. That's Federal Government. Second, to have anything to do with (156) trying to tell who to put in as watchman from stopping thievery on the pier, or to compel the company or anybody [fol. 209] else that there's got to be certain people to go on there, and thievery on the pier. That's the three. Outside of that, right now, at this special time, I wouldn't know no more, but maybe there are more.

Q. Then, is it your testimony, Mr. Moody, that if you are compelled to answer questions before the Commission in this investigation you fear you may incriminate yourself under the Statute prohibiting theft from interstate commerce?

A. That's right.

Mr. Malchman: I have no further questions.

Mr. Krieger: I have nothing further.

(Witness excused.)

Colloquy

The Court: Does that complete the evidence?

Mr. Krieger: That completes it insofar as that portion thereof, as far as pinpointing. As far as the trial of the cause, that's another story in that respect. They haven't offered any proof in that respect.

The Court: I don't follow you.

Mr. Krieger: We have offered proof on the motion, your Honor, of pinpointing the areas in which there could possibly be incrimination. (157) Insofar as a trial is concerned, your Honor must determine whether or not there will be a trial. We have other motions. Your Honor knows about the other motions as far as a jury trial.

The Court: Do you care to be heard any further on the matter that was presented this morning?

Mr. Krieger: No, your Honor, excepting if I may just take one moment. I think it is now more than clear and more than obvious that the witnesses themselves have both pinpointed. If there was any thought that the record was not sufficient, if there possibly could have been that argument that the record did not pinpoint or the record did [fol. 210] not show an area or areas of possible incrimination, now with the additional testimony by the witnesses themselves pinpointing the areas of possible incrimination, I think it is quite clear that it appears that the witnesses had a right to exercise the privilege as guaranteed to them by the laws of this State of exercising privilege in the event that there can possibly be any incrimination or tend to lead to any (158) evidence that could possibly incriminate them as far as these Federal offenses or several offenses enumerated therein.

Mr. Malchman: May I be heard very briefly on the questions that were presented this morning?

The Court: Yes.

Mr. Malchman: I think it is apparent from what has transpired this morning that these witnesses are not claiming that they fear Federal prosecution because they truly and sincerely fear such incrimination but for no other reason than they don't want to testify, and I think it is perfectly within your Honor's province to make that finding.

With respect to Mr. Murphy, he has already gone on record in this court in the first contempt proceeding instituted by the Commission that this was a labor dispute within the cognizance of the National Labor Relations Board, period. Now he comes on the stand and tells a completely different story, that he is afraid he may incriminate himself as to thefts from interstate commerce.

Apart from this blatant contradiction (159) in his sworn papers and his sworn testimony in this court, he testified just now under oath that the only basis for his incrimination were press releases by the Commission and nothing else; and not what he did or not what actually happened, [fol. 211] but because there were press releases by the Commission and, as he says, "knowing the Commission as I do."

I say to your Honor that is an insufficient basis for invoking the privilege, and the same is true of Mr. Moody.

Mr. Krieger: I am sorry that counsel missed the point completely. Evidently, he has. Your Honor, there is no testimony offered by the Waterfront Commission at all in this entire matter. The burden is upon them—

The Court: Counsel, I'm awfully sorry. I'm not going to have argument. You had all day yesterday to argue this matter.

Mr. Krieger: I'm just saying this in answer to his argument.

The Court: You may answer that and nothing else.

Mr. Krieger: I'm not going to devote (160) time to further argument. I said the burden of proof is upon them, not upon the defendants to show—all the defendants must show in the situation is that there is a possibility—

The Court: Well, counsel, you told me that about eight times during the course of this hearing.

Mr. Krieger: As far as the newspaper article he speaks of, an individual has a right to show—he went further than necessary to do so. He said at the time they had newspaper releases. They didn't deny this.

The Court: Where are the exhibits?

Mr. Malchman: The exhibits are here, your Honor.

The Court: May I have them?

Mr. Malchman: I didn't have one exhibit introduced into evidence, Exhibit 3. May I have that introduced into evidence?

The Court: What is it? Show it to your adversary.

[fol. 212] Mr. Krieger: I object to it, your Honor, because it relates to entirely other subject matter. It is a complaint that was issued at that time, part of the record of another case. (161) Insofar as the answers, they are merely answers thereto. They serve no purpose of anything, excepting an indication that the issue before the Court in 1960 was a question for the Court to determine whether or not the Waterfront Commission had jurisdiction to investigate this type of a matter, and that was the only issue for determination, and these papers show such issue, and not on this question at all, and they have no relevancy in any way.

The Court: What is this exhibit?

Mr. Malchman: This is the Commission's original motion in the original contempt proceeding to punish Moody for contempt, and this is the motion as to which Mr. Moody filed an affidavit in the first contempt proceeding denying certain paragraphs in this motion, and that affidavit is Exhibit Number 2 in evidence, and since that affidavit is in evidence, I think it would clarify Exhibit Number 2 if Exhibit Number 3 were in evidence, so it will appear what he was denying.

The Court: I'll accept it. Let it be marked.

Mr. Krieger: I object, of course.

(Commission's Exhibit Number 3 for identification received in evidence as Commission's Exhibit Number 3.)

(We will recess, gentlemen, until half-past two.)

(A recess was taken until 2:30 P. M.)

* * * * * * *

[fol. 213]

ORAL DECISION—November 22, 1961

(2) The Court: I will first consider the motion presented under the Order to Show Cause pursuant to R. R. 4:46-5(c), requiring the respondents, William Murphy and John Moody, Sr., to show cause before this Court why they should not be punished for a contempt of Court.

These respondents also move for an order quashing the subpoenas which have been issued heretofore requiring their attendance before the Waterfront Commission of New York Harbor at its offices, 15 Park Row, New York City, New York.

These two motions, by consent of counsel, were consolidated.

The defendants further move for a bill of particulars and seek, under adverse conditions, a jury trial in these proceedings for civil and criminal contempt.

The witnesses, or the respondents, also move for answers to certain interrogatories which they demand of the Commission.

The events leading up to this Order to Show Cause and the various motions are as follows:

One James H. Markley was an investigator for the Commission, assigned principally to cover (3) the piers and terminals of the American Export Lines in Hoboken. On or about May 16, 1960, Markley left the employ of the Waterfront Commission in order to work for American Export as a security officer. To fulfill his security functions, Markley obtained a license from the Commission permitting him to operate as a port watchman.

On May 16, 1960, the day Markley was to commence work for American Export, the longshoremen and checkers employed by American Export in Hoboken did not report for work. With the exception of the morning of May 17th, the work stoppage continued until May 25th. The striking employees were members of Hoboken Local number 2 of the [fol. 214] Independent Longshoremen's Association (ILA). Respondent Moody is an organizer for the ILA in New Jersey, and respondent Murphy is business agent for Local number 2.

The Waterfront Commission had information that the work stoppage was "a concerted effort to keep James H. Markley off the piers of the American Export Lines." Accordingly, it instituted an investigation to determine whether any persons registered or licensed by the Commission were (4) violating the Waterfront Commission Act (N. J. S. A. 32:23-1, etc.) by coercing an employer (American Export) to limit the functions of or discharge a licensed port watchman (Markley).

In connection with the investigation the Commission served subpoenas ordering the respondents to appear and testify. When these gentlemen appeared on May 19, 1960, at the Waterfront Commission offices at 15 Park Row, New York City, New York, they were told that they were subpoenaed for the purposes of making an investigation under Article IV of the Waterfront Commission Compact and to ascertain facts surrounding a work stoppage at Piers A, B, and C, Hoboken, New Jersey.

Respondent John Moody, Sr., gave his name and address, testified he was a union official, and refused to answer the following questions:

"Question: Are you an official of any ILA Local?"

"Question: Mr. Moody, will you tell us what local you are an official of?"

"Question: Mr. Moody, what position do you hold with the local ILA that you are affiliated with?"

"Question: All right, Mr. Moody, would you (5) tell us when you first received news of any labor trouble on Piers A, B, and C in Hoboken?"

"Question: Mr. Moody, within the last weeks have you attended any conferences with the officials of the American Export Line with respect to the work stoppage at Piers A, B, and C in Hoboken?"

[fol. 215] "Question: Have you had any conversation with Captain Andrews, Leland Andrews, of American Export Line with reference to the stoppage this week at Piers A, B, and C in Hoboken, New Jersey? When I say this week, I mean from May 16th to the present."

"Question: Mr. Moody, have you had any discussions or conversations with Captain Blackledge of American Export Lines concerning the refusal to work at Piers A, B, and C of longshoremen in that particular—on those particular piers this week?"

"Question: Have you had any conversations with Michael McNamara, Senior, Hiring Agent of the American Export Lines, concerning the work stoppages at Piers A, B, and C that have occurred since May 1, 1960, to the present?"

"Question: Mr. Moody, have you at any time (6) either prior to the work stoppage which commenced on May 16, 1960, or before that time or after that time, did you at any time issue orders for a work stoppage at Piers A, B, and C?"

"Question: Did you, before May 16th, ever give any orders for the commencement of a work stoppage at Piers A, B, and C?"

"Question: Have you since May 16th, in other words, May 16th, 17th, 18th, and 19th, have you on these particular days issued any instructions concerning work stoppages and instructions, now both either commencing or ceasing the stoppages at Pier A, B, and C in Hoboken?"

"Question: Have you had any conversations with anyone since May 16, 1960, to the present concerning the work stoppages at Piers A, B, and C?"

"Question: What is your function with the local in Hoboken?"

"Question: What is your position with the union?"

"Question: Mr. Moody, were you present on Piers A, B, and C, Hoboken, on Monday, this week?"

"Question: Were you at the piers on Tuesday?"

[fol. 216] Respondent Murphy testified that he ~~was a (7)~~ business agent of Local number 2 and represented members of the local working at the American Export facilities in Hoboken. He stated that he knew the longshoremen did not work on May 16, 1960, and that it was common knowledge for the ten days preceding May 16th that things were not normal at the American Export piers.

Respondent Murphy refused to answer the following questions:

"Question: Now, for the record, Mr. Murphy, did you have anything to do with causing the strike that is presently pending at the American Export Line?"

"Question: Did you in any way participate in the work stoppage to compel the American Export Line to discharge or to limit the duties of their employee James Markley?"

Mr. Murphy refused to give any further testimony to answer the foregoing questions.

Mr. Murphy and Mr. Moody based their refusals to testify on the following grounds:

1. The work stoppage is a matter which the Commission has no statutory authority to investigate.

2. The work stoppage is a matter over (8) which the National Labor Relations Board has exclusive jurisdiction.

3. The Commission has no right to investigate the work stoppage since civil litigation may ensue as a result thereof. (The American Export Lines had threatened to sue the ILA.)

4. The Commission's investigation seeks to inquire into a privileged communication between union and management and/or between union representatives.

Neither defendant asserted his ~~privilege against self-~~incrimination.

The Commission's interrogator overruled the defendants' objections to the question, directed them to answer, and informed them that continued recalcitrance would subject [fol. 217] them to contempt proceedings. Defendants persisted in their refusal.

Thereupon the Commission instituted contempt proceedings against the defendants, Murphy and Moody, in the Superior Court of New Jersey, Hudson County, which by judgment dated June 20, 1960, adjudged Murphy and Moody guilty of civil contempt and ordered that they be fined $50.00 each and that they be incarcerated until they (9) obeyed the Commission's subpoenas. The judgment of contempt against Murphy and Moody was affirmed by the Supreme Court of New Jersey by mandate dated May 22, 1961. A copy of the printed record upon the appeal is annexed as Exhibit C to plaintiff's moving papers herein, and a copy of the mandate of the Supreme Court as Exhibit D.

Thereafter Murphy and Moody appealed to the Supreme Court of the United States and applied to the Supreme Court of New Jersey for a stay pending such appeal, which application was denied by the Supreme Court of New Jersey on August 14, 1961. Appellants then applied to Mr. Justice Brennan of the United States Supreme Court for a stay pending appeal, which application was denied by Mr. Justice Brennan. Application was then made to Mr. Justice Brennan for reconsideration of his denial of a stay and for oral argument in connection therewith. This second application was also denied by Mr. Justice Brennan on September 29, 1961.

The defendants, Moody and Murphy, appeared before this Court on October 3, 1961, pursuant to the mandate of the Supreme Court of New Jersey. At that time they were directed to appear at the (10) offices of the Commission pursuant to the Commission's subpoenas. They did so appear as directed on October 3, 1961.

Again the defendants were advised that the purpose of the investigation was to inquire into the factual background of the work stoppage that took place on May 16, 1960, and through May 20th at Piers A, B, and C in Hoboken, to [fol. 218] inquire whether or not a violation of the Compact took place.

Mr. Murphy testified that he was business agent for Local 2 of the International Longshoremen's Association. Mr. Murphy refused to answer the following questions:

"Question: And as such business agent, what are your duties, Mr. Murphy?"

"Question: Mr. Murphy, when did you first become aware that on May 16, 1960, a work stoppage had taken place at Piers A, B, and C, Hoboken, the American Export Line Terminal?"

"Question: Did you have any conversations, Mr. Murphy, with union officials of the ILA prior to May 16, 1960, concerning the presence of one James Markley on Piers A, B, and C as a security officer for the American Export Lines?"

(11) "Question: Did you have any conversations with the officials of American Export Line on May 16, 1960, May 17, 1960, May 18, 1960, May 19, 1960, and May 20, 1960, concerning the presence of James Markley as a security officer on Piers A, B, and C, Hoboken?"

"Question: Mr. Murphy, did you at any time during the period covered by the dates May 16th to May 20, 1960, appear on the terminal or in the offices of the terminal at Piers A, B, and C, Hoboken, in connection with the work stoppage that resulted on the days May 16th to May 20th?"

"Question: Mr. Murphy, did you at any time prior to May 16, 1960, speak with one Michael McNamara, Hiring Agent at the American Export Lines Piers, concerning the presence of James Markley as a security officer on those particular piers?"

John Moody, Sr., gave his address and testified that he was an organizer of the ILA in the State of New Jersey. Mr. Moody, Sr., refused to answer the following questions:

"Question: In that position and in respect to that position, what are your duties, Mr. Moody?"

"Question: Mr. Moody, would you tell us when (12) you first became aware of labor trouble at Piers A, B, and C in [fol. 219] Hoboken on or about May 16th, during the period covered from May 16, 1960, through May 20, 1960?"

"Question: Mr. Moody, with respect to the work stoppage that occurred on May 16, 1960, at Piers A, B, and C in Hoboken, did you have any conversations with any of the union officials about the presence of one James Markley as a security officer on the said terminal?"

"Question: Mr. Moody, did you have any conversations covering the work stoppage that occurred on May 16, 1960, with officials of American Export Line, specifically Leland Andrews or others, such as Captain Blackledge, concerning the presence of James Markley on the terminal as a security officer?"

"Mr. Moody, were you physically present at Piers A, B, and C in Hoboken on May 16, 17, 18, 19 and 20, 1960?"

"Question: Mr. Moody, did you have any conversations with Michael McNamara on May 16, 17, 18, 19, or 20, 1960, concerning the presence of Markley, James Markley, a security officer on the Hoboken Terminal?".

(13) "Question: Mr. Moody, did you ever meet with any of the executives of American Export Lines with respect to settlement of the dispute concerning Markley's presence as a security officer on Piers A, B, and C in Hoboken?"

"Question: Did you ever speak to Michael McNamara prior to May 16, 1960, concerning the presence of James Markley as a security officer on Piers A, B, and C, Hoboken?

"Question: Now, Mr. Moody, did you at any time issue orders for a work stoppage on Piers A, B, and C, Hoboken, because of the presence of James Markley on Piers A, B, and C?"

"Question: Mr. Moody, have you since May 16, 1960, issued any instructions concerning work stoppages either commencing or stopping the stoppage at Piers A, B, and C, Hoboken?"

The respondents in this case, Murphy and Moody, based their refusal to answer the set out questions on the grounds [fol. 220] that they had not been properly and adequately apprised of the purpose of the investigation and on their privilege of self incrimination.

The subpoena was adjourned to October 10, 1961. The Commission was going to determine (14) whether it wished to confer immunity upon the witnesses and to provide for appropriate notice to the district attorneys involved.

On October 4, 1961, the respondents, William Murphy and John Moody, Sr., appeared again before this Court at which time this Court decided that they had purged themselves of their contempt, as the Commission had recognized as a proper ground and legal basis for their refusing to answer those particular questions, as the records shows, the basis of their constitutional right that their answers might tend to incriminate them. This Court further found the subpoenas still to be effective and returnable on October 10, 1961.

On October 27, 1961, the duly adjourned return date of the Commission's subpoenas, the defendants, Murphy and Moody, appeared at the offices of the Commission. The Commission introduced into evidence the following:

Designations authorizing Myles J. Ambrose to act in the place of Commissioner Harold R. Tyler, Jr., to confer immunity upon William Murphy and John Moody, Sr., marked Commission's Exhibits 1 and 2.

Designations authorizing William P. Sirignano (15) to act in the place of Commissioner David C. Thompson to confer immunity upon William Murphy and John Moody, Sr., marked Commission's Exhibits 3 and 4.

Letters of notice of granting immunity to William Murphy and John Moody, Sr., which were mailed to the following:

Honorable Lawrence Whipple, Prosecutor of Hudson County.

Honorable David Furman, Attorney General of New Jersey.

[fol. 221] Honorable Frank Hogan, District Attorney of New York County.

Honorable Louis Lefkowitz, Attorney General of New York.

Also offered into evidence by the Commission were the following:

Letter from David D. Furman acknowledging receipt of the previously offered letter.

Letter from Frank Hogan acknowledging receipt of the same letter.

Letter from office of Louis Lefkowitz regarding the same letter.

However, no acknowledgment was received from Lawrence Whipple, Prosecutor of Hudson County.

(16) The respondents, or the defendants, William Murphy and John Moody, Sr., were apprised that the investigation concerned a stoppage of work that occurred on the morning of May 16, 1960, at the Hoboken Terminal of the American Export Lines, Piers A, B and C in Hoboken and, further, that the parties were there to discover whether there were any violations of the Compact.

The defendants were then informed of section 5-b(5) of the Waterfront Commission Act and its passages wherein the power to grant immunity from prosecution is set forth were read to them. They were then instructed as follows:

> "If a question is asked of you and you honestly believe the answer may incriminate you, you may plead that privilege and you do not have to answer the question, except that where the Commission orders you and directs you to answer that question, you must answer it. Only you get this benefit from that direction: that any transaction concerning which you testify, you will be held immune from that and any answer you may give or evidence that you produce cannot be used against you."

[fol. 222] (17) No grant of immunity from federal prosecution was expressed.

Mr. William Murphy refused to answer the following questions:

> "Question: Are you an official of the ILA, Independent?"
>
> "Question: I direct your attention to a work stoppage that occurred on Monday, May 16, 1960, at Piers A, B, and C, Hoboken, the American Export Lines Terminal. Did you have any prior knowledge that a work stoppage would occur Monday, May 16, 1960, at the said terminal?"
>
> "Question: Mr. Murphy, who were the persons that gave you the information about the work stoppage on May 16, 1960, at the Hoboken Terminal of the American Export Line?"
>
> "Question: Mr. Murphy, did you at ~~any time~~ give orders to longshoremen or others such as shop stewards that a work stoppage was to take place on May 16, 1960, at the American Export Line Terminal in Hoboken?"
>
> "Question: Mr. Murphy, was the work stoppage that took place on the American Export Line Pier on May 16,

1960, related to the presence of one James Markley on the piers as a (18) security officer?"

"Question: Mr. Murphy, do you know whether the work stoppage that took place on May 16, 1960, at the American Export Line Terminal was related to the presence of one James Markley on the piers as a security officer?"

"Question: Mr. Murphy, did you have any conversations with any union officials of the ILA prior to May 16, 1960, about the presence of James Markley on the Hoboken Terminal as security officer?"

"Question: On May 16, 1960, did you, Mr. Murphy, have a conversation with one Leland Andrews concerning this work stoppage that took place on May 16, 1960, at the American Export Line Pier?"

[fol. 223] "Question: Did you in the conversation with Mr. Andrews on the 16th of May, 1960, reach any agreement over the presence of Mr. Markley on the Hoboken Terminal of the American Export Lines in Hoboken?"

"Question: Mr. Murphy, on the morning of May 17, 1960, were you on the American Export Line Hoboken Terminal?"

"Question: Mr. Murphy, on May 17, 1960, at (19) the Hoboken Terminal of the American Export Line did you have a conversation with one Michael McNamara?"

"Question: Mr. Murphy, on the morning of May 17, 1960, at the American Export Line Terminal in Hoboken did you have a conversation with one Frank Rump?"

"Question: Mr. Murphy, on the morning of May 17, 1960, did you have a conversation with one Carmen Bruno?"

"Question: Mr. Murphy, on the morning of May 17, 1960, at the Hoboken Terminal did you have a conversation with one Eric Lumpke?"

"Question: Mr. Murphy, on the morning of May 17, 1960, did you have a meeting with officials of the American Export Line?"

"Question: Did you at that time reach any agreement concerning the presence of Mr. Markley on the Hoboken Terminal as a security officer?"

"Question: Mr. Murphy, did you have a meeting with the Executive Vice President of American Export Line at the offices of the American Export Line at 39 Broadway in New York City in August, 1960?"

(20) "Question: Mr. Murphy, did you at that meeting with the Executive Vice President of the American Export Line state that if Mr. James Markley walked on the Piers A, B, and C in Hoboken there would be a strike?"

"Question: Did you, Mr. Murphy, ever discuss or give any orders to any shop stewards or officials of your local to pull the men out on Piers A, B, and C in the event Mr. Markley walked onto the piers in May of 1960 in the per- [fol. 224] formance of his duty as a security officer for the American Export Lines?"

"Question: Mr. Murphy, do you know now whether Mr. Markley has ever, since May, 1960, walked on the piers in Hoboken, New Jersey, of the American Export Lines in connection with his duties as a security officer for that company?"

"Question: Mr. Murphy, do you know if Mr. Markley was at any time employed by this commission in any capacity whatsoever?"

"Question: Mr. Murphy, is it not true that the statement you made to the Vice President of the American Export Line in August, 1960, that if Mr. Markley steps on the Hoboken Terminal there would be a strike, is still in force today and (21) that Mr. Markley cannot step on the pier today in pursuance of his duties as a security officer?"

"Question: Mr. Murphy, did you in August, 1960, tell the Executive Vice President of the American Export Line that if Mr. Markley stepped on the piers there would be a walkout?"

"Question: In the event that Mr. Markley walked on the piers of Hoboken, New Jersey, today on the American Export Lines would you order the membership of the ILA present there off the piers?"

John Moody, Sr., gave his name and address. Mr. Moody, Sr., however, refused to answer the following questions:

"Question: Are you an official of the International Longshoremen's Association Independent or the International Longshoremen's Association which is affiliated with the AFL-CIO?"

"Question: Mr. Moody, I direct your attenttion to a work stoppage that occurred on Monday, May 16, 1960, at Piers A, B, and C, Hoboken, the American Export Lines Terminal. Did you have any prior knowledge that that work stoppage was to take place on Monday, May 16, 1960, at (22) that terminal?"

[fol. 225] "Question: Mr. Moody, would you tell the Commission the source of the knowledge that you had concerning the work stoppage at Piers A, B, and C, Hoboken, in May, 1960?"

"Question: Mr. Moody, did you at any time prior to May 16, 1960, give orders to any longshoremen, shop stewards, or others to commence a work stoppage on Monday, May 16, 1960, because of the presence of one James Markley on the piers as security officer?"

"Question: Mr. Moody, did you have any conversations with any other union official of the International Longshoremen's Association prior to May 16, 1960, about calling a strike concerning James Markley's presence on the Hoboken Terminal as a security officer?"

"Question: Did you have a conversation about calling a strike during the week of May 16, 1960, with one Mr. Gleason of the ILA?"

"Question: On the 17th of May, 1960, were you present on the terminal in Hoboken, which is called the American Export Lines Terminal? Were you present?"

"Question: Did you on that date, May 17, (23) 1960, tell the shop stewards, Frank Rump, Carmine Bruno, Eric Lumpke, to call the longshoremen out on strike because of Mr. Markley on the piers as a security officer?"

"Question: Did you attend a meeting on May 17, 1960, at the offices of the American Export Lines at the Hoboken Terminal? Did you attend such a meeting?"

"Question: Did you at that meeting state to Leland Andrews, another official of the American Export Lines, who attended the meeting, if Markley walks on the piers there would be a work stoppage?"

"Question: Did you either before May 16, 1960, or during the week of May 16, 1960, speak to Michael McNamara concerning a work stoppage at the American Export Lines Terminal over the presence of Mr. Markley at the piers?"

"Question: Prior to May 16, 1960, or during the week of May 16, 1960, did you have a conversation with Michael

McNamara concerning a work stoppage to be called on May [fol. 226] 16, 1960, over the presence of James Markley on the Hoboken Terminal as a security officer?"

"Question: Do you know Mr. William Murphy?"

(24) "Question: Do you see Mr. Murphy sitting in this room?"

"Question: Do you know Leland Andrews, Mr. Moody?"

"Question: Do you know Mr. Lyle Bull, Executive Vice President of the American Export Lines?"

"Question: Did you at any time, either in Hudson County, in the State of New Jersey, or in the County of New York in the State of New York, have any discussion with any executives of the American Export Lines, concerning Mr. Markley's employment with that shipping company?"

"Question: Do you know whether Mr. Markley has ever been on the piers in the performance of his duties as security officer of the American Export Lines since his employment in May of 1960?"

The respondents were directed by the designees of the Waterfront Commissioners to answer these questions. The defendants, or respondents, were told they were granted immunity as to their testimony.

The defendants refused to answer any of the above questions in spite of the direction to (25) answer by the said designees and the promise of immunity, and based their refusal on the grounds that the Commission failed to set forth fully the purposes of the investigation, a failure of due process, and they further invoked the privilege of self incrimination.

The Waterfront Commission now seeks to have the defendants adjudged guilty of contempt of court, civil and criminal, for their failure to answer the questions set out after they had been granted immunity from prosecution by the Commission.

In opposition, the defendants claim the purported grant of immunity is invalid because the Commission failed to comply with the statute which grants immunity, N. J. S. A. [fol. 227] 32:23-86(5) in that proper notice was not sent to the various law officers of the two states, in that the grant of immunity was not explicit as to each question and, further, in that it was improper for the designees of the Commissioners of the Waterfront Commission to grant this immunity. The defendants further maintain that they were denied due process in that the Commission failed to disclose any damaging information it had and (26) further failed to produce accusatory witnesses.

The defendants, or respondents, rely strongly on N. J. S. A. 84 A, Rules of Evidence, and contend that Rule 24 of that section, N. J. S. A. 2A:84 A-18, extends the definition of incrimination to crimes against the United States and other states and that Rule 25 of that section wherein is provided "Subject to Rule 37, every natural person has a right to refuse to disclose in an action or to a police officer or other official any matter that will incriminate him or expose him to a penalty or a forfeiture of his estate" thereby provides a privilege of self-incrimination which includes federal incrimination as well as state incrimination. This is one of the contentions of these witnesses, or defendants.

The defendants contend that since the purported immunity granted by the Commission does not apply to immunity from federal incrimination, it is not coextensive with the privilege against self-incrimination invoked and is, therefore, unconstitutional.

The defendants further maintain that they have reasonable cause to apprehend a criminal (27) prosecution and set out numerous federal statutes it may be claimed they violated.

The defendants claim a failure of due process of law in that they were not properly apprised of the subject matter of the investigation, as I have previously stated.

The Waterfront Commission Act was passed by the State of New Jersey in 1953 (R. S. 32:23-1 etc.).

Some of the general powers of the Commission are as follows:

[fol. 228] "Article IV.

"In addition to the powers and duties elsewhere prescribed in this compact, the Commission shall have the power

"8. By its members and its properly designated officers, agents and employees to administer oaths and issue subpoenas throughout both states to compel the attendance of witnesses and the giving of testimony and the production of other evidence.

"11. To make investigations, collect and compile information concerning waterfront practices generally within the Port of New York District and upon all matters relating to (28) the accomplishment of the objectives of this Compact.

"13. To make annual and other reports to the governors and legislatures of both states containing recommendations for the improvement of the conditions of waterfront labor within the Port of New York District, for the alleviation of the evils described in Article I and for the effectuation of the purposes of this Compact." (Waterfront Commission Act, Part 7, Article IV, Sections 8, 11, 13, N. J. R. S. 32:23-10.)

"Witness shall mean any person whose testimony is desired in any investigation, interview or other proceeding conducted by the Commission pursuant to the provisions of this Act." N. J. R. S. 32:23-85.

N. J. R. S. 32:23-86 provides:

"In addition to the powers and duties elsewhere prescribed in this Compact, the Commission shall have the power

"To confer immunity in the following manner: In any investigation, interview or other proceeding conducted under oath by the Commission or any duly authorized officer, (29) employee or agent thereof, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and notwithstanding such refusal, an order is made upon [fol. 229] twenty-four hours' prior written notice to the appropriate attorney general of the State of New York or the State of New Jersey, and to the appropriate district attorney or prosecutor having an official interest therein, by the unanimous vote of both members of the Commission or their designees appointed pursuant to the provisions of section three of article III of this Act, that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order and if but for this subdivision he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him as provided for herein.

"Immunity as used in this subdivision means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or (30) thing concerning which, in accordance with the order of the unanimous vote of both members of the Commission or their designees appointed pursuant to the provisions of section three of Article III of this Act, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer or in producing or failing to produce evidence in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt.

"Immunity shall not be conferred upon any person except in accordance with the provisions of this subdivision. If after compliance with the provisions of this subdivision, a person is ordered to answer a question or produce evidence of any other kind and complies with such order, and it is thereafter determined that the appropriate attorney general or district attorney or prosecutor having an official interest therein (31) was not notified, such failure or neglect shall not deprive such person of any immunity properly conferred upon him."

[fol. 230] N. J. R. S. 32:23-9 provides:

"The Commission shall act only by unanimous vote of both members thereof. Any member may, by written instrument filed in the office of the Commission, designate any officer or employee of the Commission to act in his place as a member whenever he shall be unable to attend a meeting of the Commission. A vacancy in the office of a member shall not impair such designation until the vacancy shall have been filled."

Chief Justice Weintraub, in *Department of Health, State of New Jersey, versus Peter Roselle,* N. J. , a case decided on March 20, 1961, in the Supreme Court of New Jersey, sets forth the history of contempt actions and describes and defines both civil and criminal contempt. He said, among other things:

"If the order is mandatory and the violator has the ability to perform, the Court will ordinarily jail the offender until he complies. If the order is prohibitory, again the offender (32) may be incarcerated until he undoes the violation if he has the ability to undo it."

The present proceeding is both criminal and civil.

In the above cited case, Judge Weintraub said:

"Yet the object of the proceedings is of great moment for if it is criminal, he is entitled to the safeguards accorded one charged with crime, except the constitutional guarantee of the indictment and trial by jury, and even as to them, we note in passing that a vigorous dissent in *Green versus United States*, 356 U. S. 165, 2 L. Rev. 672, 1958, finds those rights are assured. See Comment, 57 Michigan Law Review, 258, 1958."

N. J. S. 2A:10-1 deals with the power of the courts "to punish for contempt."

The contempt process is severe because of its summary nature and the many different parts a court plays in the proceeding. Naturally, the power should be used cautiously and sparingly.

[fol. 231] I find that the designations authorizing Myles J. Ambrose to act in the place of Commissioner Harold Tyler, Jr., to confer immunity upon William Murphy and John Moody, Sr., which (33) designations were introduced into evidence by the Waterfront Commission at the investigation of October 27, 1961, before mentioned, and the designations authorizing William P. Sirignano to act in the place of Commissioner David C. Thompson to confer immunity upon William Murphy and John Moody, Sr., at the same investigation are valid and comply with the requirements of N. J. R. S. 32:29-9 above.

I further find that the letter to Lawrence A. Whipple, Prosecutor of Hudson County, New Jersey, dated October 10, 1961, and the letter to David D. Furman, Attorney General of New Jersey, along with the letter dated October 23, 1961, to Frank Hogan, District Attorney for New York County, New York, and the letter dated October 24, 1961, to Louis Lefkowitz, Attorney General for New York, which letters were introduced into evidence at the said investigation of October 27, 1961, meet the requirements for notice set out in N. J. R. S. 32:23-86 and are sufficient for the purpose therein expressed.

I find that the explanation of the doctrine and statutory provision of immunity, as expressed by Mr. Piazzi and Mr. Sirignano of the Waterfront (34) Commission on pages 58, 59, 60, etc., of the transcript of the investigation relating to William Murphy on October 27, 1961, which is incorporated into the investigation of that date concerning John Moody, Sr., by the statements of parties expressed on page 1 of the transcript of that investigation, which is further explained on pages 8 and 9 of said transcript, adequately and properly apprised the defendants of the offered grant of immunity whenever the privilege of self incrimination is invoked and the defendants were directed by the designees of the Commissioners to answer the questions.

The transcripts of the investigations conducted May 19, 1960, October 3, 1961, and October 27, 1961, are replete with [fol. 232] explanations as to the subject matter of the investigation. The opinion of the Supreme Court of New Jersey confirming this Court's judgment of contempt against Murphy and Moody sets forth at length the subject matter of the Commission's investigation. The Jurisdictional Statement filed in the Supreme Court of the United States further shows the defendants' familiarity with the (35) subject matter of the Commission's investigation.

I now turn to a consideration of the defendants' contention as advanced in their supplemental and reply brief that the grant of immunity offered by the Waterfront Commission is unconstitutional in that it is not co-extensive with the privilege against self-incrimination invoked. Defendants argue that N. J. R. S. 84 A-1, etc., does not extend the privilege against self-incrimination to a protection against federal incrimination.

It is acknowledged that the grant of immunity offered by the Waterfront Commission did not extend to protection against federal incrimination.

This Court, in a consideration of Chapter 84 A, Rules of Evidence, notes that Rule 2, N. J. R. S. 2A:84 A-16, Scope of Rules, provides in section 4 as follows:

"The enactment of the rules set forth in this act or the adoptions pursuant hereto *shall not operate to repeal any statute by implication.*" Italics by the Court.

Rule 25, N. J. R. S. 2A:84 A-19, Self Incrimination; Exceptions, provides as follows:

(36) "Subject to Rule 37, every natural person has a right to refuse to disclose in an action or to a police officer or other official any matter that will incriminate him or expose him to a penalty or a forfeiture of his estate, except that under this rule.

"(c) *No person has a privilege to refuse to disclose any matter which the statutes or regulations governing his office, activity, occupation, profession or calling,* or governing the corporation or association of which he is an officer, [fol. 233] agent or employee, *require him to record, or report or disclose,* except to the extent that such statute or regulations provide that the matter to be recorded, reported, or disclosed shall be privileged or confidential." Italics by the Court.

N. J. R. S. 2A:84 A-40, Effect of Rules on Conflicting Laws, provides:

"All previous laws or parts of laws dealing with the admission or rejection of evidence *which shall be expressly identified by footnotes to any rule so adopted* and which shall be in conflict or inconsistent with such rule or rules or included therein, revised or rendered obsolete (37) thereby shall be of no further force or effect after such rule or rules shall have taken effect." Italics by the Court.

The "Repeals" provision of the statute referred to provides:

> "The following acts and parts of acts and all amendments and supplements thereto are hereby repealed: Sections 2A:81-3, 2A:81-5, 2A:81-7, 2A:81-9 and 2A:81-10 of Title 2A of the New Jersey Statutes."

The italics of all of the foregoing, of course, is supplied by the Court.

As can be seen from the quoted sections, the new Rules of Evidence (N. J. R. S. 2A:84 A-17, etc.) do not operate to repeal any statutes by implication. (2A:84 A-16.)

Previous laws identified by footnotes are to be affected by the new rules. (2A:84 A-40.) The particular section of the New Jersey statutes affected is 2A:81-3, etc.

The Waterfront Commission Act is not affected by these new rules. It is not repealed by implication. It constitutes a statute governing and regulating the waterfront and as such is provided for by 2A:84-19(c), wherein is (38) stated:

> "No person has a privilege to refuse to disclose any matter which the statutes or regulations governing his office, activity, occupation * * * require him to disclose."

One of the main arguments advanced by the defendants is that the immunity must be coextensive with the privilege. New Jersey could never grant federal immunity as the [fol. 234] Legislature has no power so to do. If this contention is correct, then the State could never grant immunity. It is not essential that for the purpose of conferring immunity federal immunity must also be conferred.

Rule 24 of the Rules of Evidence expressly provides that those rules do not operate to repeal any statutes by implication.

> "The enactment of the rules set forth in this Act or the adoption of rules pursuant hereto shall not operate to repeal any statutes by implication." (R. S. 2A:84 A-16(4).)

It is to be further noted that in the report of the Legislative Commission to study the improvement of the law of evidence, page 15, 1956, it states:

(39) "This paragraph has the effect of continuing all existing statutes. This Commission feels that it is necessary to review the New Jersey Statutes in detail and to specifically treat each such statute dealing with evidence. Otherwise, a wholesale repeal of many statutes, without consideration of all the implications, would result."

Our Supreme Court referred to this report interpreting the rules of evidence. *Nussbaum versus Newark Morning Ledger Company,* 33 N. J. 419, 424 (1960).

Thus it is seen that the privilege against self-incrimination which the defendants are relegated to invoke by the statutory law of New Jersey deal only with a privilege against incrimination dealing with the state. By virtue of the Waterfront Compact this is extended to New York, which has passed the Waterfront Commission Act. (N. Y. Law 1953, 882.)

In the case of the *State of New Jersey versus Francis Murphy, et al.,* decided in the last few weeks, in an opinion by Chief Justice Weintraub, he said:

"In short, the States did not create a (40) governmental authority and cut the umbilical cord, if, indeed, constitutionally they could. As the agent of each state, the Commission is subject to all of its laws, whether of statutory or [fol. 235] common law origin, excepting insofar as the States agreed expressly or by fair implication to place it beyond them."

I find the grant of immunity offered to the defendants under N. J. R. S. 32:23-86 is co-extensive with the privilege against self-incrimination which they may invoke.

The fact that the immunity granted does not extend to immunity from federal prosecution does not affect the constitutionality of the statute granting immunity.

See *Feldman versus United States,* 322 U. S. 487, 491, citing *Jack versus Kansas,* 199 U. S. 372, 380, wherein it is stated:

"This court (U. S. Supreme Court) has held that immunity against state prosecution is not essential to the validity of federal statutes declaring that a witness shall not be excused from giving evidence on the ground that it will incriminate him, and also that the lack of state power to give witnesses protection against (41) federal prosecution does not defeat a state immunity statute * * *"

See *Knapp versus Schweitzer, Judge of the Court of General Sessions, et al.*, 357 U. S. 371.

The respondents and witnesses, Murphy and Moody, have taken the stand in an attempt to pinpoint the federal criminal involvement which they fear.

See *In re Boiardo,* 34 New Jersey 599 (1961).

It is incumbent upon these witnesses to show that there is a reasonable basis for such fear of criminal involvement. This testimony is difficult to believe in the light of the respondent Murphy's statement to his attorney, Mr. Wall. See Exhibit C to the Commission's motion herein, page 30a, where he contended that a labor dispute existed cognizable by the National Labor Relations Board and this negatives the possibility of the work stoppage involved being a part of a conspiracy to commit theft from Interstate Commerce or extort money or otherwise involve a violation of the Federal Criminal Code.

See pages 7, 8, 9, 10, and 11 of the Commission's reply brief.

[fol. 236] (42) All briefs, including the one just mentioned, are, of course, in evidence.

It is to be noted that the Waterfront Act was passed primarily to eliminate criminal domination of waterfront labor, that its passage followed extensive study of waterfront conditions by New York, New Jersey, and Congress. Its provisions must be interpreted in the light of its extensive legislative history. Its provisions are to be given effect.

The interpretation these witnesses would have the Court give to its provisions as to the compelling of attendance and testimony of witnesses by subpoena and the granting of immunity from self-incrimination would render it useless and powerless to effectuate the purposes for which it was designed.

For the reasons above stated the Court is constrained to find both Messrs. Murphy and Moody guilty of contempt, civil and criminal, this being both civil and criminal contempt.

The defendants' motions which the Court has before it for consideration, naturally, will be denied. Those motions were motions directed to the discretion of the Court. However, the (43) disposition of the matter on its merits finally disposed of them, but even in the exercise of discretion, none of those motions would be granted by this Court. So all the other motions are respectfully denied.

The Court will defer the imposition of sentence of these defendants for one week from today in order to secure a pre-sentence report from the Probation Department, and I will request that counsel arrange to be here one week from today at 9:30, with the defendants present, of course.

Mr. Krieger: May I, for the record—I understand your Honor is not fixing a trial on either the civil or criminal contempt and makes a finding on these issues without trial?

The Court: Yes.

Mr. Krieger: Are we excused now?

The Court: Yes.

[fol. 237]

In the Superior Court of New Jersey.

Defendant's Motion to Quash Subpoenas, etc.

To: Robert A. Pin, Esq., Attorney for Waterfront Commission of New York Harbor, 15 Park Row, New York City, New York.

Sir:

Please Take Notice that on Friday, the 3rd day of November, 1961, the undersigned shall move before the Superior Court of New Jersey, at the Court House, Jersey City, Hudson County, New Jersey, at 9:30 a.m. in the forenoon, or as soon thereafter as counsel can be heard, for an Order quashing the subpoenas which have been issued heretofore, requiring the attendance of William Murphy and John Moody, Sr. before the Waterfront Commission of New York Harbor at their offices 15 Park Row, New York City, New York.

1. That the said Waterfront Commission of New York Harbor have abused the said process issued by them.

2. That the said William Murphy and John Moody, Sr. have on numerous occasions responded to the said subpoenas.

3. That the said Waterfront Commission of New York Harbor has failed and refused to set forth purposes and objects, nor submitted evidence for an investigation to be had.

4. The said Waterfront Commission has acted in violation of the constitutional rights of said William Murphy and John Moody, Sr., in that they deprived the said individuals of the due process of law.

[fol. 238] 5. The said Waterfront Commission has endeavored to grant to the said individuals what they referred to as immunity from prosecution.

6. The said actions of the Waterfront Commission in endeavoring to grant immunity is contrary to law and they are without power.

7. The statute relied upon by the Waterfront Commission is in violation of law and unconstitutional.

8. That the said Waterfront Commission has refused to make available a copy of the record or statement of the individuals heretofore given by the said individuals.

9. The Waterfront Commission is attempting to enlarge the judgment of this Court and the Supreme Court of the State of New Jersey, in endeavoring to go beyond the order of this Court and the mandate of the Supreme Court in its remand.

10. The questions involved in the original matter before this Court have been duly exhausted and disposed of and the very questions involved having been answered by the purging of the contempt.

11. The attempt made by the Waterfront Commission to enlarge the Subpoena beyond that which was before the Courts and determined in this issue, is improper and illegal and the Subpoena has been completely exhausted.

And for such other good and sufficient cause as may be moved at the trial.

Krieger & Chodash, Attorneys for William Murphy and John Moody, Sr., By: Harold Krieger.

[fol. 239]

IN THE SUPERIOR COURT OF NEW JERSEY

AFFIDAVIT OF ROBERT H. WALL IN SUPPORT OF MOTION

STATE OF NEW JERSEY
COUNTY OF HUDSON, ss.:

Robert H. Wall, being duly sworn according to law upon his oath, deposes and says:

1. I am one of the attorneys representing the said William Murphy and John Moody, Sr., the defendants in the within cause of action.

2. On numerous occasions I appeared on behalf of one or both of the said individuals before the Waterfront Commission of New York Harbor, at 15 Park Row, New York City, New York, in response to a subpoena that was issued and served upon the said individuals.

3. I am associated with Harold Krieger, Esq. as co-counsel representing the said named individuals, William Murphy and John Moody, Sr..

4. On the 3rd day of October, 1961, I appeared together with Harold Krieger, Esq., before the Waterfront Commission and all questions that were propounded to the said individuals were answered by them. The said individuals were available for all questions that were to be propounded to them and such representations were made to the Waterfront Commission as well as to the Court.

5. On the aforesaid date the said Waterfront Commission commented that they would secure an immunity to be given to William Murphy and John Moody, Sr., and ordered that the said individuals return on another day.

6. The matter is now being continued to October 23, 1961, at the office of the Waterfront Commission.

[fol. 240] 7. The Waterfront Commission has heretofore refused a demand made that the said individuals be given copies of statements made by them in response to the said Subpoenas.

8. The Waterfront Commission further refused to give to the Attorneys for the said individuals, copies of said record although same was used in the Courts by the said Waterfront Commission.

9. I, together with Harold Krieger, Esq., on behalf of the said William Murphy and John Moody, Sr., have demanded copies of the statements of the individuals as made by them to the Waterfront Commission and the said Waterfront Commission has refused to grant such application or make available to counsel or to the said individuals, copies of the said statements.

10. The Waterfront Commission had denied to the said individuals due process of law and the constitutional rights to which the individuals have been abridged by the Waterfront Commission, and their attempt to use the Subpoena at this time is the abuse of process by them.

11. The Waterfront Commission under the law have the right to issue subpoenas, but the issuing of said subpoenas cannot be abused, nor does the law give the right to abuse the use of the subpoena powers.

12. The Waterfront Commission in an article released in a local newspaper stated that immunity would be granted to the said individuals to compel them to answer questions heretofore asked and to deprive them of their use of constitutional privileges against self-incrimination.

12A. The individuals have fully complied with the Subpoenas heretofore issued, as well as the order of the Court [fol. 241] and have been purged of any contempt by order of the Court. In that, the Court made a finding that the individuals have answered as required by law.

12B. The mandate of the Court having thus been fully complied with, the application of the Waterfront Commission herein for further testimony under said subpoena is an illegal attempt to enlarge the mandate of this Court beyond the scope of the issues fully litigated in this proceeding.

13. The Waterfront Commission is endeavoring to grant immunity by reason of statutory provisions. The said provision is unconstitutional and illegal, in that the same is contrary to law and the Waterfront Commission as an agency of the State of New Jersey has no right to grant immunity and that any provision of law which would permit such actions of the Waterfront Commission would be improper and a violation of law.

(a) Under the law of the State of New Jersey neither the Attorney General of the State of New Jersey, a Prosecutor or a Grand Jury can grant immunity.

(b) Further, the Waterfront Commission is without power to act on behalf of the United States of America in the granting of an immunity, nor do they have the power and statute to do so.

14. A full examination of the record heretofore made will indicate the questions and their imputation.

15. An Order should be entered in this matter quashing the Subpoenas referred to.

Robert H. Wall

(Sworn to October 23, 1961.)

[fol. 242]

IN THE SUPERIOR COURT OF NEW JERSEY

Excerpts From Sentence Proceedings

Before:

Hon. Joseph L. Smith, J. S. C.

APPEARANCES:

• • • • • • •

(2) Mr. Krieger: We are here in response to your Honor's direction, sir.

The Court: Well, I assume the Waterfront Commission will move?

Mr. Pin: Pursuant to your Honor's direction, sir, we now move for the imposition of sentence in the matter of the application of the Waterfront Commission to punish John Moody, Sr., for failure to obey a subpoena and in the matter of the application of the Waterfront Commission to punish William Murphy for failure to obey a subpoena.

The Court: Have you any recommendation or suggestion?

Mr. Pin: Not as to specific penalty, sir.

The Court: What is that?

Mr. Pin: Not as to specific penalty. However, I do recommend that consideration be given to the fact that this matter has been pending for a period of a year and a half and I consider this to be one of the most flagrant challenges to the dignity and standing of the Waterfront Commission, which, under the Statute, has to be considered as an affront to the dignity of this Court. In view of the fact that this (3) is unquestionably deliberate and intentional, I urge this Court to make such punishment as shall be commensurate with the offense and keeping in mind the fact that this may very well serve as a deterrent to others in similar circumstances. I ask for substantial imposition of punishment.

The Court: What do you mean, not as to specific penalty?

Mr. Pin: As to any terms, as to a period of confinement, or the amount of fine. The Waterfront Commission respect- [fol. 243] fully declines to ask for any specific amount of penalty of incarceration as to time or fine as to amount.

The Court: Well, you concede that there has to be a specific period of confinement under the criminal contempt?

Mr. Pin: Yes. That is our position, sir.

The Court: All right, gentlemen.

Mr. Krieger: I speak now for both Murphy and Moody because they are both in the same position. Counsel merely indicated as far as Murphy is concerned. I assume what he said as far as Murphy also applies to Moody. They are both defendants or respondents in this cause.

(4) I don't want to take any further time than has been taken in the argument of this matter. I don't intend to do so this morning. I think I indicated at the time your Honor

disposed of this matter, which has been disposed of on a motion to quash the subpoenas as well as a motion by the Waterfront Commission to determine whether there is criminal and civil contempt, or any contempt—your Honor determined on motion they were guilty of criminal and civil contempt.

I merely want to say this: I think your Honor, in his wisdom, in his judgment, knows even though the Waterfront Commission states that this matter is pending a year and a half from its original inception, as he puts it, I respectfully contend that this matter is not pending a year and a half. What may have transpired in May of 1960 had no application to the issue involved because your Honor in October of 1961 had purged both of these defendants of contempt in that they had complied with the order of this Court.

Now, what happened subsequently in their endeavor, that is, the Waterfront Commission's (5) endeavor, to extend immunity upon the assertion by the defendants of self-incrimination under the Statute, I say that the same constitutes a novel situation in that this Statute of immunity insofar as its application to our Statute of privilege has [fol. 244] never been determined by the Courts of this state. Neither the Nussbaum case or the Boiardo case, neither one of them, neither case, had disposed of that question because that question was not before our courts.

Now, surely, these defendants have a right, a constitutional right, to assert a constitutional right, and for the assertion of a constitutional right or statutory right they are not punished. There was no contempt of this Court because there has been no order by this Court made at any time compelling these individuals to answer these questions based upon their assertion of privilege under these circumstances.

I have too much respect for your Honor to quarrel or find fault with the disposition except to say as a lawyer representing both of these defendants that I firmly disagree (6) with the Court. I think the Court realizes that. I made my position clear in that respect. I have my opinion as a lawyer in representing these people, that they have been deprived of their respective rights under the disposition of this case.

However, on the question of sentence, I don't think a sentence could be entered in this case or sustained in this case based upon the facts that appear before the Court, on the motion argued. I don't think there should be a sentence and any sentence that could be imposed at this time would be a violation of their rights.

I might also urge your Honor, insofar as these individuals are concerned, so your Honor will know, they have never been in contempt of this Court as such, insofar as the order is concerned, insofar as this incident of October, 1961. They have never been adjudicated in that respect; they have never been directed in that respect by the Court. The Waterfront Commission of New York Harbor is not a court of law of the State of New Jersey. It is not in the category of a court. (7) It is an administrative agency, so held by [fol. 245] our courts. It is strictly and purely and simply an administrative agency, and that is all it is, and they couldn't be in contempt of the Waterfront Commission of New York Harbor.

Now, I might further say, as far as Murphy and Moody, neither one have ever been convicted of anything. Both are respectable individuals. They work for a livelihood and they have never been confined to any institution because of any violation of any law, never been sentenced or found guilty of any law.

I say to your Honor very frankly just to punish these people when they feel they have a right and they want to assert a right and because they assert a right and the assertion of the right carries with it a punishment, I know that your Honor will not adhere to such a policy.

Now, there is nothing in our law—and I want to say to counsel—I don't know of anything in our law which requires a court to sentence any individual to a jail term under the criminal contempt at all. That is discretionary with the Court. Subject to the (8) Statute, the Court has a right to suspend the operation of any sentence, and there are cases on that, sir.

I respectfully leave it to your Honor's discretion under all these circumstances.

The Court: Mr. Wall?

Mr. Wall: That covers all sides of it, sir. I have nothing to say.

The Court: Counsel will note from the memorandum which the Court orally gave in this case, consisting of 43 pages, that the Court took pains to set out at length the questions that were asked of these witnesses on the three dates on which they appeared in answer to the subpoenas, namely, May 19, 1960, October 3, 1961, and October 27, 1961. The purpose of the Court in setting forth these questions in the memorandum was to show that each of these witnesses was asked substantially the same questions three times and [fol. 246] on three different occasions the witnesses refused to answer the questions.

The Court is fully cognizant and subscribes to defense counsel's argument that these witnesses had a perfect right to interpose whatever (9) legal objections were at their command to their not answering any of these questions, and this Court in no sense is taking into consideration, in imposing any sentence on the finding of their being guilty of contempt in the present proceeding, any objections which they interposed, which they had a perfect legal right to do at the time these questions were propounded to them.

However, I am constrained to believe that there has to be and there now is, at least for the present, an end to these witnesses being asked these questions. The first order of contempt, of which they purged themselves in accordance with the very statement of the Waterfront Commission examiner, the first order of contempt was June 20, 1960. The second order of contempt was the order now before this Court for the passing of this sentence.

The Court has found both of these witnesses guilty of both civil and criminal contempt.

There is nothing more unpleasant to any Court than the imposition of sentence. It certainly is not anything that this Court has any liking for doing, the imposition of sentence. It never has, and I can't see any reason why (10) any Court should look forward to the time when a sentence is to be imposed by the Court. However, Courts have to impose sentences. That is the law.

I, therefore, will ask that an order be prepared in the body of which order is set out verbatim the very questions that were asked of these witnesses at the hearing which is now before this Court. I want those questions set out and the date they were asked set out and the action of the witnesses in response to those questions; then the finding of the Court in the order that they were found guilty of contempt.

[fol. 247] I want a provision in the order that the Court orders those witnesses to responsively answer those questions by order of this Court, and the Court will impose a sentence on these witnesses of a fine of $50.00 and a confinement of thirty days, and a warrant will issue, accordingly. That will be the terms of my sentence.

Now, in addition to that, gentlemen, I might say this: That if the terms of the provisions of the order are met by the witnesses making responsive answers to these questions (11) which will be enumerated, no doubt then application would be made to a court for a purging of the contempt, which could then be followed by a court's power to change the sentence imposed, and if that event comes about, this Court has no objection to any other judge who may sit in the matter exercising his proper judgment and discretion in passing upon such an application, because this Court itself may not be sitting at that time. I want that clearly put on the record.

I am very grateful to counsel in this case. It was most strenuously presented to the Court. Not only was it strenuously presented but presented most vigorously, most intelligently, and most helpfully to the Court. It was a very difficult matter for this Court to determine. Naturally, it took a great deal of time of this Court to give consideration and thought to the several questions that were propounded and raised and presented to it for determination; and that is why my memorandum is rather longer than my memorandums usually are, because it was a memorandum which I thought at least should try to answer as many of the points that were presented to me (12) as seemed to me of any importance. I am very grateful to all counsel for their attention in this matter.

Mr. Krieger: For the record, may I say this? May I merely request your Honor to fix bail pending appeal, reasonable bail pending appeal? We are entitled to bail as a matter of right.

[fol. 248] The Court: What bail was fixed the last time?

Mr. Krieger: Five hundred dollars.

The Court: I'll fix the same bail. No objection to that, is there, counsel?

Mr. Pin: That will be satisfactory.

* * * * * * *

(14-6) Mr. Krieger: I am sure counsel does not want to deprive the defendants of their right of appeal.

The Court: The Court wouldn't deprive you of that. The Court would do anything it should to permit an appeal.

* * * * * * *

(16-12) The Court: I don't want any appellate court to get the idea that I have granted a stay because I have some thought that I am not right, because that is not so.

Mr. Krieger: I am saying on the record that I understand that, sir. Your Honor is granting the stay taking into consideration the facts and circumstances.

The Court: All right.

* * * * * * *

[fol. 249]

IN THE SUPERIOR COURT OF NEW JERSEY

Excerpts From Proceedings to Settle Terms of Order

December 4, 1961

Before:

Hon. Joseph L. Smith, J. S. C.

* * * * * * *

(18-8) The Court: Gentlemen, it was strictly my intention in imposing this sentence that these witnesses be fined $50.00 and ordered by this Court to answer these questions that they had not answered on three appearances before this Commission and to answer these questions in a responsive manner, and until they did so answer these questions in a responsive manner they were to stand committed, as well as under the criminal contempt they were to be given a sentence of thirty days.

So I have stricken from the order submitted by Mr. Krieger the following paragraph:

> "It is further ordered and adjudged by this Court that in the event that said defendant, William Murphy, purges himself of the contempt, an application may be made for a suspension of the sentence imposed."

(19) I have stricken that out of the order because there is no reason for it. If he complies with the order he may make application, if he purges himself at any time. That is the law.

I have added to that: "It is further ordered that the subpoena is to be obeyed and performed by the giving of responsive answers to the aforesaid questions before the members of the Waterfront Commission of New York Harbor or their designees appointed pursuant to the provisions of Section 3 of Article III of the Waterfront Commission Act (N. J. S. 32:23-9) and that he stand committed to the Hudson County Jail until he has complied with this paragraph of this order, as well as until such fine has been paid.

* * * * * * *

(19-21) Mr. Krieger: That applies in both instances, I assume?

The Court: Both witnesses.

[fol. 250]

IN THE SUPERIOR COURT OF NEW JERSEY

JUDGMENT RE: JOHN MOODY, SR.—Filed December 4, 1961

This matter being opened by Robert A. Pin, Esq. Attorney for the Waterfront Commission of New York Harbor, the moving party, in the presence of Harold Krieger, Esq. and Robert Wall, Esq., Attorneys for John Moody, Sr., upon the return of an order of this court dated November 1, 1961, directing said John Moody, Sr. to show cause why he should not be adjudged guilty of criminal and civil contempt for failure to obey a subpoena issued by the Waterfront Commission of New York Harbor, an administrative agency, and in accordance with the opinion of this court dated November 22, 1961, defendant John Moody, Sr. was adjudged guilty of criminal and civil contempt in his failure to answer certain questions as required by the subpoena, on the 27th day of October, 1961:

1. Q. "Mr. Moody, are you an official of the International Longshoreman's Association Independent or the International Longshoremen's Association which is affiliated with the AFL-CIO?"

2. Q. "Mr. Moody, I direct your attention to a work stoppage that occurred on Monday, May 16, 1960 Piers A, B, and C, Hoboken, the American Export Lines Terminal. Did you have any prior knowledge that the work stoppage was to take place on Monday, May 16, 1960, at that terminal?"

3. Q. "Mr. Moody, would you tell the Commission on the source of the knowledge that you have concerning the work stoppage, Piers A, B, and C, Hoboken, May 16, 1960?"

4. Q. "Mr. Moody, did you, at any time, prior to May 16, 1960 give orders to any longshoreman, shop stewards or others to commence a work stoppage [fol. 251] on Monday, May 16, 1960, because of the presence of one James Markley on the piers as a security officer?"

5. Q. "Mr. Moody, did you have any conversations with any other union official of the International Longshoreman's Association prior to May 16, 1960 about calling a strike concerning James Markley's presence on the Hoboken Terminal as a security officer?"

6. Q. "Did you have a conversation about calling a strike during the week of May 16, 1960, with one Mr. Gleason of the I. L. A.?"

7. Q. "On the 17th of May, 1960 were you present on the terminal in Hoboken, which is called the American Export Lines Terminal? Were you present?"

8. Q. "Did you, on that date, May 17, 1960, tell the shop stewards, Frank Rump, Carmine Bruno, Eric Lempke to call the longshoremen out on strike because of the presence of Mr. Markley on the piers as a security officer?"

9. Q. "Did you attend the meeting on May 17, 1960 in the offices of the American Export Lines at the Hoboken Terminal? Did you attend such a meeting?"

10. Q. "Did you at that meeting state to Leland Andrews another official of the American Export Lines who attended the meeting, if Mr. Markley works on the piers there would be a work stoppage?"

11. Q. "Prior to May 16, 1960, or during the week of May 16, 1960, did you have a conversation with Michael McNamara, concerning a work stoppage [fol. 252] to be called on May 16, 1960, over the presence of James Markley from the Hoboken Terminal, as a security officer?"

12. Q. "Do you know Michael McNamara, Mr. Moody?"

13. Q. "Do you know Mr. William Murphy?"

14. Q. "Do you know Leland Andrews, Mr. Moody?"

15. Q. "Do you know Mr. Lyle Bul, Executive Vice President, American Export Lines?"

16. Q. "Did you, at any time, either in Hudson County, in the State of New Jersey, or in the County of New York, in the State of New York, have any discussions, with any executives of the American Export Lines, concerning Mr. Markley's employment with that shipping company?"

17. Q. "Do you know whether M. Markley has been on the piers in the performance of his duties as a security officer of the American Export Lines, since his employment in May, 1960?"

At the time of the return of the order to show cause and on the same date, there was argued a motion to quash the subpoena of John Moody, Sr., which was consolidated with the motion of the Waterfront Commission.

There were also motions made by defendant for a jury trial and for a bill of particulars on the charge of criminal contempt and a demand for interrogatories on the civil contempt charge, which said motions were all denied by this court.

It is on this 4th day of Dec., 1961, as appears in the opinion-memorandum of this court, ordered and adjudged that defendant, John Moody, Sr., is guilty of both criminal and civil contempt, and it is the sentence of this court that said defendant be fined $50.00 and sentenced for a period of 30 days, and a warrant to issue accordingly.

[fol. 253] It is Further Ordered that the subpoena is to be obeyed and performed by the giving of responsive answers to the aforesaid questions before the members of the Waterfront Commission of New York Harbor, or their designees, appointed pursuant to the provisions of Sec. 3—Art. III of the Waterfront Commission Act (N. J. S. 32:23-9), and that he stand committed to the Hudson County Jail until he has complied with this paragraph of this order, as well as until such fine has been paid.

It is Further Ordered and Adjudged that the execution of a warrant be stayed until the disposition of the appeal in this matter, bond having been heretofore posted pursuant to the order of this court.

Joseph L. Smith, J. S. C.

IN THE SUPERIOR COURT OF NEW JERSEY

JUDGMENT RE: WILLIAM MURPHY—Filed December 4, 1961

This matter being opened by Robert A. Pin, Esq., Attorney for the Waterfront Commission of New York Harbor, the moving party, in the presence of Harold Krieger, Esq., and Robert Wall, Esq., Attorneys for William Murphy, upon the return of an order of this court dated November 1, 1961, directing said William Murphy to show cause why he should not be adjudged guilty of criminal and civil contempt for failure to obey a subpoena issued by the

Waterfront Commission of New York Harbor, an administrative agency, and in accordance with the opinion of this court dated November 22, 1961, defendant William Murphy was adjudged guilty of criminal and civil contempt in his failure to answer certain questions as required by the subpoena on the 27th day of October, 1961:—

1. Q. "Are you an official of the ILA, Independent?".

[fol. 254]

2. Q. "I direct your attention to a work stoppage that occurred on Monday, May 16, 1960 at Piers A, B, C, Hoboken, the American Export Lines Terminal. Did you have any prior knowledge that a work stoppage would occur Monday, May 16th at the said terminal?

3. Q. "Mr. Murphy, when did you first hear that a work stoppage was in progress at Piers A, B, and C, Hoboken? And I am referring to the May 16th, 1960 work stoppage."

4. Q. "Mr. Murphy, who were the persons that gave you the informaton about the work stoppage on May 16, 1960 at the Hoboken Terminal of the American Export Lines?"

5. Q. "Mr. Murphy, did you, at any time, give orders to longshoremen or others such as shop stewards that a work stoppage was to take place on May 16, 1960 at the American Export Line Terminal in Hoboken?"

6. Q. "Mr. Murphy, do you know whether the work stoppage that took place on May 16, 1960 at the American Export Line Terminal was relating to the presence of one James Markley on the piers as a security officer?"

7. Q. "Mr. Murphy, did you have any conversation with any union officials of the I. L. A. prior to May 16, 1960 about the presence of James Markley on the Hoboken Terminal as a security officer?"

8. Q. "On May 16th, 1960, did you Mr. Murphy, have a conversation with one Leland Andrews concerning this work stoppage that took place on May 16, 1960 at the American Export Line Pier?"

[fol. 255]

9. Q. "Did you, in the conversation with Mr. Andrews on the 16th day of May, 1960, reach any agreement over the presence of Mr. Markley on the Hoboken Terminals of the American Export Lines in Hoboken?"

10. Q. "Mr. Murphy, on the morning of the 17th of May, 1960, were you on American Export Line Hoboken Terminal?".

11. Q. "Mr. Murphy, on May 17th, 1960, at the Hoboken Terminal of the American Export Line, did you have a conversation with one Michael McNamara?"

12. Q. "Mr. Murphy, on the morning of May 17th, 1960 at the American Export Line Terminal in Hoboken, did you have a conversation with one Frank Rump?"

13. Q. "Mr. Murphy, on the morning of May 17th, 1960, did you have a conversation with one Carmine Bruno?"

14. Q. "Mr. Murphy, on the morning of May 17th, 1960, at the Hoboken Terminal, did you have a conversation with one Eric Lempke?"

15. Q. "Mr. Murphy, on the morning of May 17th, 1960 did you have a meeting with officials of the American Export Line at the Hoboken Terminal of the American Export Line?"

16. Q. "Did you, at that time, reach any agreement concerning the presence of Mr. Markley on the Hoboken Terminal as a security officer?

17. Q. "Did you ever make any demand from any officer of American Export Line to fire Mr. Markley before the men went back to work?"

[fol. 256]

18. Q. "Did you tell any officer of the American Export Lines that the men would not go-back to work until Mr. Markley was kept off the piers?"

19. Q. "Mr. Murphy, did you have a meeting with the Executive Vice-President of the American Export Line at the offices of the American Export Line at 39 Broadway in New York City in August, 1960?"

20. Q. "Mr. Murphy, did you, at that meeting with the Executive Vice-President of the American Export Line, state that if Mr. James Markley walked on Piers A, B and C in Hoboken, there would be a strike?"

21. Q. "Did you, Mr. Murphy, ever discuss or give any orders to any shop stewards or officials of your local to pull the men out of Piers A, B and C in the event Mr. Markley walked onto the piers in May of 1960 in the performance of his duty as a security officer for the American Export lines?"

22. Q. "Mr. Murphy, do you know now whether Mr. Markley has ever, since May, 1960, walked on the piers in Hoboken, New Jersey of the American Export Lines in connection with his duties as a security officer for that company?"

23. Q. "Mr. Murphy, do you know if Mr. Markley was at one time employed by this Commission in any capacity whatsoever?"

24. Q. "Mr. Murphy, did you, in August, 1960, tell the Executive Vice-President of the American Export Line that if Mr. Markley stepped on the piers there would be a walkout?"

[fol. 257]

25. Q. "In the event that Mr. Markley walked on the piers of Hoboken, New Jersey today on the American Export Lines, would you order the membership of the I. L. A. present there off the piers?"

At the time of the return of the order to show cause and on the same date, there was argued a motion to quash the subpoena of John Moody, Sr., which was consolidated with the motion of the Waterfront Commission.

There were also motions made by defendant for a jury trial and for a bill of particulars on the charge of criminal contempt and a demand for interrogatories on the civil contempt charge, which said motions were all denied by this court.

It is on this 4th day of December, 1961, as appears in the opinion-memorandum of this court, Ordered and Adjudged that defendant, William Murphy, is guilty of both criminal and civil contempt, and it is the sentence of this court that said defendant be fined $50.00 and sentenced for a period of 30 days, and a warrant to issue accordingly.

It Is Further Ordered that the subpoena is to be obeyed and performed by the giving of responsive answers to the aforesaid questions before the members of the Waterfront Commission of New York Harbor, or their designees, appointed pursuant to the provisions of Sec. 3-Art. III of the Waterfront Commission Act (N. J. S. 32:23-9), and that he stand committed to the Hudson County Jail until he has complied with this paragraph of this order, as well as until such fine has been paid.

It Is Further Ordered and Adjudged that the execution of a warrant be stayed until the disposition of the appeal in this matter, bond having been heretofore posted pursuant to the order of this court.

Joseph L. Smith, J. S. C.

[fol. 258]

In the Superior Court of New Jersey

Notice of Appeal Re: John Moody, Sr.— Filed December 11, 1961

Notice Is Hereby Given that the defendant, John Moody, Sr., appeals to the Superior Court of New Jersey, Appellate Division, from the whole of the judgment of the Superior Court entered on December 4th, 1961 in favor of the Waterfront Commission of New York Harbor and against said defendant, John Moody, Sr., adjudging him guilty of both criminal and civil contempt.

Krieger & Chodash, Esqs., Attorneys for Defendant,
John Moody, Sr., by Harold Krieger.

Robert H. Wall, of Counsel.

Dated: December 8, 1961

IN THE SUPERIOR COURT OF NEW JERSEY

NOTICE OF APPEAL RE: WILLIAM MURPHY—Filed December 11, 1961

Notice Is Hereby Given that the defendant, William Murphy, appeals to the Superior Court of New Jersey, Appellate Division, from the whole of the judgment of the Superior Court entered on December 4th, 1961 in favor of the Waterfront Commission of New York Harbor and against the said defendant, William Murphy, adjudging him guilty of both criminal and civil contempt.

Krieger & Chodash, Esqs., Attorneys for Defendant,
William Murphy, by Harold Krieger.

Robert H. Wall, of Counsel.

Dated: December 8, 1961

[fol. 259]

IN THE SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION.

DOCKET NO. A- -59.

Civil Actions.

On Appeal from a Judgment of the Superior Court—Law Division, Hudson County.

Sat below: Joseph L. Smith, J. S. C.

IN THE MATTER

of

THE APPLICATION OF THE WATERFRONT COMMISSION OF NEW YORK HARBOR, to punish WILLIAM MURPHY for failure to obey a Subpoena.

IN THE MATTER

of

THE APPLICATION OF THE WATERFRONT COMMISSION OF NEW YORK HARBOR, to punish JOHN MOODY, SR. for failure to obey a Subpoena.

Excerpts from Brief for Appellants, William Murphy and John Moody, Sr.

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[fol. 260] STATEMENT OF FACTS

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[fol. 261]

During the period commencing May 16 and ending May 25, 1960, the Commission does not allege, nor were there any acts of violence committed; there were no pickets, picketing, or demonstrations; no person was assaulted or intimidated; no crimes were committed; no property was damaged; the streets were not blocked or obstructed and traffic in and out of the piers was not impeded.

* * * * * * *

[fol. 262]

IN THE SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION.

DOCKET NO. A- -59.

Civil Actions.

On Appeal from a Judgment of the Superior Court—Law Division, Hudson County.

Sat below: Joseph L. Smith, J. S. C.

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THE APPLICATION OF THE WATERFRONT COMMISSION OF NEW YORK HARBOR, to punish WILLIAM MURPHY for failure to obey a Subpoena.

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of

THE APPLICATION OF THE WATERFRONT COMMISSION OF NEW YORK HARBOR, to punish JOHN MOODY, SR. for failure to obey a Subpoena.

Excerpts from Appendix to Brief for Appellants, William Murphy and John Moody, Sr.

* * * * * * *

[fol. 263]

BEFORE THE WATERFRONT COMMISSION OF NEW YORK HARBOR.

Proceeding in the Matter of an Investigation Under Article IV of the Waterfront Commission Compact.

PROCEEDINGS OF MAY 19, 1960

15 Park Row, New York, New York, 3:00 P.M.

APPEARANCES:

For the Commission: William P. Sirignano, Esq., General Counsel.

Present: Myles J. Ambrose, Esq., Executive Director; Anthony L. Piazza, Esq., Assistant Counsel; James B. White, Esq., Assistant Counsel.

Witness: John Moody, Sr., 1111 Washington Street, Hoboken, New Jersey.

Attorney for the Witness: Lawrence E. Florio, Esq., 84 Washington Street, Hoboken, New Jersey.

(1) Mr. Piazza: Investigation under Article IV of the Waterfront Commission Compact.

Would you note your appearance, sir.

Mr. Florio: My name is Lawrence E. Florio, 84 Washington Street, Hoboken, New Jersey. I am an attorney and [fol. 264] in a representative capacity for and on behalf of Mr. John Moody.

Mr. Piazza: Would you raise your right hand.

Do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?

Mr. Moody: Yes.

JOHN MOODY, SR., residing at 1111 Washington Street, Hoboken, New Jersey, appearing as a witness, having been duly sworn, testified as follows:

By Mr. Piazza:

Q. What is your name and address?

A. John Moody, Sr., 1111 Washington Street, (2) Hoboken, New Jersey.

Q. Mr. Moody, you are here pursuant to subpoena; is that correct, sir?

A. That's right.

Mr. Florio: Prior to the inception of the interrogation, might I ask, for the benefit of myself and on behalf of my client, what the purpose of the investigation is in order that I may so advise Mr. Moody what his rights are.

Mr. Piazza: Mr. Florio, the purpose of the investigation is to ascertain facts surrounding a work stoppage at Piers "A", "B" and "C", Hoboken, New Jersey.

Mr. Florio: Yes.

Mr. Piazza: Fair enough?

Mr. Florio: That's good enough.

Q. Mr. Moody, you are a union official?

A. Yes.

Mr. Florio: Mr. Piazza, now, I am going to make a continual objection on behalf of Mr. Moody: One, this is an investigation proceeding for the record which may in the [fol. 265] (3) future become a public document; two, it is the opinion of myself that in this matter it is strictly a matter for labor and management and that the Waterfront Agency has no jurisdiction whatsoever. It is my opinion that the purpose of the Waterfront Commission for the New York and New Jersey Port of Metropolitan Area is solely for the purpose of maintaining peace, safety, protection of crime along the waterfront and on the piers. And I reiterate that this matter does not come within the jurisdiction of the Waterfront Compact, and in that respect I will advise my client, Mr. Moody, to say nothing at this hearing.

Mr. Piazza: This is not a hearing.

Mr. Florio: Or at this—

Mr. Piazza: This is an investigation.

Mr. Florio: At this interrogation.

Mr. Piazza: This interrogation is for the purpose of collecting facts concerning (4) the work stoppage. Now, do I understand you to state essentially that we are without jurisdiction in this matter since it is a labor dispute?

Mr. Florio: A labor and a management problem as of this moment.

Mr. Piazza: What did you mean by a labor-management problem?

Mr. Florio: That there is an authority called The New York Shipping Association which has full jurisdiction over matters such as these.

Mr. Piazza: Well, I overrule your objection and I direct Mr. Moody to answer the questions when I put them to him.

Q. Now, the first question is: Are you an official of any ILA local?

[fol. 266] Mr. Florio: I must continue to advise my client to refuse to answer because of reason aforesaid.

Mr. Piazza: I overrule the objection and I direct you to answer.

(5) A. I am not answering.

Mr. Florio: For the record, there is another reason which may not be appropriate at the present time, but another reason for my insistence on Mr. Moody remaining silent: That is that in our local papers there has been reports from the executive offices or directive of the American Export Line that there may be a civil suit pending in this matter before the Commission.

Mr. Piazza: A civil suit pending here before the Commission?

Mr. Florio: No, in the matter now here before the Commission. And in that respect I too must advise Mr. Moody not to answer because this is now being taken down stenographically, it is part of an investigation and which, in my opinion, may lead to a public hearing; and in the event that Mr. Moody is called on to testify at the public hearing and he so refuses, that this record may be introduced in evidence for what (6) he says here now. And I must insist that Mr. Moody take the stand that he has taken.

Mr. Piazza: Before I proceed, Mr. Florio, I wish to instruct you that we are moving under the authority vested in this Commission under Article IV of the Waterfront Commission Compact, and under that Article, the Commission is empowered to make investigation, collect and compile information concerning waterfront practices generally within the Port of New York District and upon all matters [fol. 267] relating to the accomplishment of the objectives of this Compact.

Mr. Florio: Would you read the objectives for the record, please.

Mr. Piazza: Well, I don't think it is necessary. They are found in Article I and—

Mr. Florio: What are the objectives?

Mr. Piazza: I don't see that I have to read them into the record at this time. They are part of the law, and based upon what (7) I said I direct Mr. Moody to answer the last question.

Mr. Florio: Well, I say—

Mr. Piazza: Would you read the last question so I know what it is.

Mr. Florio: I can reiterate the question.

Mr. Piazza: I asked the reporter. I am conducting the hearing—the investigation, rather.

(Reporter read back last question.)

Q. Mr. Moody, will you tell us what local you are an official of?

A. I am not answering no question.

Q. On advice of counsel?

A. That's right.

Q. On the grounds aforesaid?

A. I am not answering any question without my counsel.

Q. Your counsel's advice?

A. That's right.

Q. On the grounds that you already stated.

(8) Mr. Florio: I have already stated those grounds and further—

Q. I rule that those—what has already been stated as grounds are not sufficient and I direct you to answer the question put to you, Mr. Moody.

A. I am not answering.

Q. Do you have any other grounds you wish to state?

Mr. Florio: Well, I would like the purposes of this Compact read into the record at this time.

[fol. 268] Mr. Piazza: I don't think this is necessary. Any court can take judicial notice of what the law is.

Q. Mr. Moody, what position do you hold with the local of the ILA that you are affiliated with?

A. I am not answering.

Q. I direct you to answer.

A. On advice of counsel I am not answering.

Q. All right, Mr. Moody, would you tell us when you first received news of any labor trouble on Piers "A," "B" and "C" in Hoboken?

(9) A. On my counsel's advice, I am not answering.

Q. I direct you to anwser.

A. Not answering on advice of my counsel.

Q. Mr. Moody, within the last week have you attended any conferences with the officials of the American Export Line with respect to the work stoppage at Piers "A", "B" and "C" in Hoboken?

Mr. Florio: I object to this question, one, I would state that any communication between any union official or any between management and labor is certainly a privileged one and—

Mr. Piazza: Privileged on what theory?

Mr. Florio: Privileged between management and labor.

Mr. Piazza: On what theory?

Mr. Florio: Privilege between labor and management under the existing contract between the New York Shipping Association and International Longshoremen's Association.

Mr. Piazza: I know of no privilege (10) and I find your objection insufficient and defective of law and I overrule that.

[fol. 269] You must answer the question, Mr. Moody. I direct you to answer.

Mr. Moody: I am not answering on advice of my counsel.

Q. Have you had any conversations with Captain Andrews, Leland Andrews, of American Export Line with respect to the stoppage this week at Piers "A", "B" and "C" in Hoboken, New Jersey? When I say "This week," I mean from May 16th to the present.

Mr. Florio: I object to the question on two grounds: One, is that you have not laid any basis for the stoppage; two, that any conversation with Mr. —whoever you mentioned—Mr. Andrews is certainly privileged between these two gentlemen.

Mr. Piazza: I overrule the objection and direct you to answer.

Mr. Moody: I am not answering on the advice of my counsel.

Q. You understand, Mr. Moody, your refusal to answer may be subjected to a court test.

(11) A. I am still not answering on advice of my counsel.

Mr. Florio: That's in the nature of advice, I assume.

Mr. Piazza: That's correct, because you are here, you are advising him.

Mr. Florio: No, I mean the statement you made to Mr. Moody.

Mr. Piazza: That's right.

Q. Mr. Moody, have you had any discussions or conversations with Captain Blackledge of the American Export Lines concerning the refusal to work at Piers "A", "B" [fol. 270] and "C" of longshoremen in that particular—on those particular piers this week?

Mr. Florio: I must object again for the reason aforesaid: That this is not a matter to come under the jurisdiction of this Agency—pardon me—Administrative Agency.

Mr. Piazza: I overrule the objection.

I direct you to answer.

Mr. Moody: I am not answering on advice of my counsel.

(12) Q. Have you had any conversations with Michael McNamara, Senior Hiring Agent of the American Export Lines, concerning the work stoppages at Piers A, B, and C that have occurred since May 1, 1960 to the present?

Mr. Florio: I object to that question because—

Mr. Piazza: Same grounds?

Mr. Florio: No. You haven't laid any foundation that since May 1st there has been any work stoppage. You haven't laid the foundation to nothing. You want to know conversations—

Mr. Piazza: Mr. Florio, if there is to be a foundation there has to be answers to questions. There have been no answers to any questions and therefore I overrule your objection as insufficient in law and I direct Mr. Moody to answer.

Mr. Moody: I am not answering on the advice of my counsel.

Q. Mr. Moody, have you at any time, either prior to the work stoppage which commenced on May 16th, 1960 or before that time or after that time, did you at any time (13) issue orders for a work stoppage at Piers A, B and C?

A. I am not answering on advice of my counsel.

[fol. 271] Q. I direct you to answer, Mr. Moody.

Mr. Florio: At direction of the Commission, I would suggest that you answer the question.

Would you repeat the question.

(Reporter read back last question.)

Mr. Florio: Well, I am going to object to that question as being too broad in scope.

Mr. Piazza: Is that the ground of your objection?

Mr. Florio: Yes.

Mr. Piazza: I overrule the objection.

I direct you to answer.

Mr. Moody: I am not answering on the advice of my counsel.

Q. Did you, before May 16th, ever give any orders for the commencement of a work stoppage at Piers A, B and C?

Mr. Florio: I object to that question as being too broad in character. Mr. Moody has been a union official for a number of years, and prior to May 16 would entail 20 to 25 years (14) of union officialdom, so to speak, and I would ask you to fix the time.

Q. I am referring specifically to the work stoppage that took place on May 16 to the present time?

A. I am not answering on advice of counsel.

Q. Have you since May 16, in other words, May 16, May 17, May 18 and May 19, have you on these particular days issued any instructions concerning work stoppages, any instructions, now both either commencing or ceasing the stoppage at Piers A, B and C, Hoboken?

A. I am not answering on the advice of my counsel.

Q. I direct you to answer.

A. I am not answering on advice of my counsel.

[fol. 272] Q. Have you had any conversations with anyone since May 16th, 1960 to the present concerning the work stoppage at Piers A, B and C?

A. I am not answering on the advice of my counsel.

Mr. Florio: And I object to the question as being too broad in scope.

Mr. Piazza: I overrule the objection and direct you to answer.

Mr. Moody: I am not answering on advice of my counsel.

(15) Mr. Piazza: We will have a five minute recess.

(Recess held.)

(At this point Mr. Ambrose, Executive Director; Mr. Sirignano, General Counsel, and Mr. White, Assistant Counsel entered room.)

Mr. Piazza: Mark the appearance of Mr. Sirignano, General Counsel.

By Mr. Sirignano:

Q. Mr. Moody, I understand that you have taken the position that you are not going to answer any questions here; is that correct, sir?

A. That's correct.

Q. Do you understand that we are conducting an investigation to determine whether any violations of the Compact are being committed in connection with the present work stoppage at the American Export Lines at Piers A, B and C in Hoboken? You understand that?

Mr. Florio: He has been so advised, Mr. Sirignano.

Q. And that in connection with that investigation you have been subpoenaed here and you are here pursuant to a subpoena; is that correct, sir?

(16) A. It must be.

[fol. 273] Q. And you are represented by counsel?

A. That's right.

Q. And Mr. Piazza has put certain questions to you; is that right?

A. Correct.

Q. Now, you have refused to answer those questions, and what are your grounds, please?

A. On advice of my counsel.

Q. That's not a legal ground. Do you want the counsel to state the grounds for you?

Mr. Florio: I have already made a continuing objection. Would you read it from the record, please.

Would you note the appearance of two other gentlemen in this room.

Mr. Sirignano: Myles Ambrose, Executive Director and Mr. White, Assistant Counsel.

As I understand, Mr. Florio, your objection to the questions that were asked Mr. Moody is on the grounds that we lack jurisdiction in this matter; is that correct? You are not claiming or Mr. Moody is not claiming any rights against (17) self-incrimination; is that correct?

Mr. Florio: Not at this time.

Mr. Sirignano: At this time you are not claiming any such rights?

Mr. Florio: When the question arises and we feel any questions would involve any self-incrimination to Mr. Moody, I will so advise him.

Mr. Sirignano: You are now objecting solely to the jurisdiction of this Commission to conduct this investigation?

Mr. Florio: Right.

Mr. Sirignano: We make note of your objections, Mr. [fol. 274] Florio, and we direct Mr. Moody to answer. Now, do you want to proceed with the interrogation? Your objection is on the record. He is directed to answer at this point.

Q. Now, Mr. Moody—

Mr. Florio: At whose direction?

Mr. Sirignano: I am directing him to answer.

Q. What is your function with the local in Hoboken?

(18) A. I refuse to answer on my counsel's advice.

Q. You are directed to answer. That's not legal grounds.

A. I am not answering.

Q. You refuse to answer?

A. That's right.

Q. And if I ask any further question you will take the same position?

A. That's right.

Q. You are not claiming the fifth amendment to the Constitution about the right of self-incrimination, are you, to this question?

Mr. Florio: What question?

Q. What is your position with the union?

A. I am not answering on advice of my counsel.

Q. You understand, Mr. Moody, that refusal to answer on a non-legal ground subjects you to a contempt proceeding; you understand that, do you not?

A. I am not answering on advice of my counsel.

Q. Mr. Moody, were you present at Piers A, B and C, Hoboken, on Monday of this week?

Mr. Florio: That question has already been asked, Mr. Sirignano, and it has been answered (19) in the previous—

Mr. Sirignano: Do you mean it hasn't been answered and [fol. 275] you are refusing to answer the question as previous? You are refusing to answer that question on the same grounds?

Mr. Florio: Yes, sir.

Q. Were you at the piers on Tuesday?

Mr. Florio: That's repetitious and the whole issue has been gone into on one occasion and you have had the same response.

Mr. Sirignano: Mr. Florio, the question becomes repetitious when an answer hasn't been made here. We have no answer, as I understand it.

Mr. Florio: I understand that, but you have the answer.

Mr. Sirignano: You already have an objection?

Mr. Florio: I am making an objection further and continuing along the same line as aforesaid.

Mr. Sirignano: On the lack of jurisdiction of this Commission to ask these questions?

(20) Mr. Florio: There is another reason in there too that hasn't been read by the stenographer.

Mr. Sirignano: Would you care to reiterate?

Mr. Florio: It's in the record.

Mr. Sirignano: State it, please, it will save reading of the record again.

Mr. Florio: There has been talk, solely in the talking stage now and it has been promulgated in our local newspapers in New Jersey that the officials of the American Export Lines have intentions of beginning a civil suit against locals involved here, and I know from experience that while this is an investigation and so-called secret investigation, the records are being kept secret, that there may be a hearing and at some future time will prejudice Mr. Moody's interest if these answers that he may give become public.

[fol. 276] Mr. Sirignano: In other words, it is your objection there may be a future civil suit?

Mr. Florio: That's right. And if he answers here they may adversely use those questions in that civil suit.

(21) Mr. Sirignano: Your objection is overruled. You are directed to answer.

Mr. Moody: Not answering on advice of my counsel.

Q. You take the same position?

A. That's right.

Mr. Sirignano: No further questions. You are excused. (3:31).

Affidavit of John Moody, Sr.

John Moody, Sr., of full age, being duly sworn according to law upon his oath deposes and says:

1. I deny the allegations of paragraphs 5 and 9 of the Motion papers filed herein.

2. I deny the allegations of paragraphs 13 and 14 of the Motion papers filed herein.

3. I deny the assertion set forth in paragraph 2 of the Affidavit of William P. Sirignano.

John Moody, Sr.

Sworn and subscribed to before me this 1st day of June, 1960.

Margaret C. Kelly, A Notary Public of New Jersey.

[fol. 277]

IN THE SUPERIOR COURT OF NEW JERSEY

LAW DIVISION, HUDSON COUNTY

Docket No.

IN THE MATTER

of

THE APPLICATION OF THE WATERFRONT COMMISSION OF NEW YORK HARBOR, to punish WILLIAM MURPHY for failure to obey a Subpoena.

ANSWERING STATEMENT AND AFFIDAVIT OF WILLIAM MURPHY —Filed June 7, 1960

1. William Murphy is Business Agent for Local 2 of the International Longshoremen's Association.

2. William Murphy has never been convicted of a crime, and in spite of his being acquitted of a charge, the Waterfront Commission of the Port of New York arbitrarily denied him the right to work on the waterfront. This is ex post facto, for even in view of an acquittal by a jury, the Waterfront Commission of the Port of New York saw fit to punish William Murphy even though he is innocent.

3. There exists a contract between the American Export Lines and Local 2 of the International Longshoremen's Association and said contract covers any and all labor problems together with a method of resolving same. The National Labor Relations Board has full control and jurisdiction of any labor disputes.

[fol. 278] 4. The Waterfront Commission of the Port of New York does not have any jurisdiction of any labor problems by Statute 32:23-1 et seq. It appears in the Notice of Motion and more particularly, Paragraph Two thereof, that it has dependent for its jurisdiction in this matter, on a report of the New York State Crime Commission, which report was filed prior to the enactment of the Waterfront Commission Statute in New Jersey.

5. There does not exist any accusation or charges setting forth a reason for intermeddling in a purely labor situation, in fact, William P. Sirignano, General Counsel and Hearing Officer in the instant matter, so stated at the hearing.

6. William Murphy appeared, was sworn and answered certain questions, contrary to the allegations as made in Paragraph Thirteen of the Notice of Motion. William Murphy qualified his refusal to answer stating that he was threatened with a suit, that a labor dispute was in progress and he felt that any requirements to answer would deprive him and the members of Local 2 aforesaid, of their rights under the Fourteenth Amendment of the Constitution of the United States, and further, that the Waterfront Commission of the Port of New York had no jurisdiction in the labor problem. In this way, he legally qualified his reasons for not answering the questions asked.

7. William Murphy is not registered or licensed by the Waterfront Commission of the Port of New York, and, therefore, in accordance with Paragraph Nine of the Notice of Motion in which the Commission states that it "desired to determine whether any persons registered and licensed by the Waterfront Commission are participating in such legal coercion." William Murphy does not come under the control of the Waterfront Commission of the Port of New York. The only reference to any jurisdiction of the Port of [fol. 279] New York concerning labor and labor representatives as such, is to be found in N. J. R. S. 32:23-10, Paragraph 12: "To advise and consult with representatives of labor and industry * * *" etc.

8. In conclusion, it is apparent that a labor dispute exists under full control of the United States Government, National Labor Relations Board, and to allow the Waterfront Commission of the Port of New York to intermeddle, would lead to the impairment of the existing contractual relationship between Labor and Management.

Robert H. Wall, Attorney for William Murphy.

STATE OF NEW JERSEY,
COUNTY OF HUDSON, ss.:

William Murphy, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am Business Agent of Local 2 of the International Longshoremen's Association.

2. The facts and matters set forth in the foregoing Answering Statement are true, to the best of my knowledge and belief.

William Murphy.

Subscribed and sworn to before me this 25th day of May, 1960.

Joan M. Hogan, Notary Public of New Jersey.
My Commission Expires Aug. 24, 1961.

[fol. 280]

BEFORE THE WATERFRONT COMMISSION OF NEW YORK HARBOR

Proceeding in the Matter of an Investigation Under Article IV of the Waterfront Commission Compact

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PROCEEDINGS OF MAY 19, 1960

15 Park Row, New York, New York, 3:00 P.M.

APPEARANCES:

For the Commission: William P. Sirignano, Esq., General Counsel.

Present: Myles J. Ambrose, Esq., Executive Director; Anthony L. Piazza, Esq., Assistant Counsel; James B. White, Esq., Assistant Counsel.

Witness: William Murphy, 218 Roosevelt Street, Union City, New Jersey.

Attorney for the Witness: Judge Robert Wall, 880 Bergen Avenue, Jersey City, New Jersey.

(1) Mr. Sirignano: May we note the appearances, please.

Mr. Murphy: Mr. William Murphy.

Judge Wall: William Murphy.

[fol. 281] Mr. Sirignano: And, you're represented by Counsel, Mr. Murphy?

Mr. Murphy: That's right.

Mr. Sirignano: And your Counsel's name is?

Mr. Murphy: Robert Wall.

Mr. Sirignano: May we have your address?

Judge Wall: 880 Bergen Avenue, Jersey City.

Mr. Sirignano: You are present in the room here; is that right?

Judge Wall: Yes.

Mr. Sirignano: Mr. Murphy, you're here pursuant to a subpoena; is that correct, sir?

Mr. Murphy: That's right.

Mr. Sirignano: Would you kindly raise your right hand. Do you solemnly swear to tell the truth, (2) the whole truth and nothing but the truth, so help you God?

Mr. Murphy: I do.

William Murphy, residing at 218 Roosevelt Street, Union City, New Jersey, appearing as a witness, having been duly sworn, testified as follows:

By Mr. Sirignano:

Q. Mr. Murphy—

Judge Wall: Just a minute.

Pardon me, Mr. Sirignano, would you kindly outline the purpose of this meeting?

Mr. Sirignano: Yes.

Judge Wall: For the purpose of the record.

Mr. Sirignano: This is an investigation pursuant to the [fol. 282] powers vested in the Commission in the Waterfront Commission Compact, to determine whether there are any violations of the Waterfront Commission Compact in the pending work stoppage at the (3) Hoboken Piers.

Judge Wall: In a pending work stoppage?

Mr. Sirignano: Yes.

Judge Wall: There are no accusations existing.

Mr. Sirignano: That is an investigation, Judge Wall. At the present time there are no accusations made against any person subject to the jurisdiction of this Commission.

Judge Wall: Now, what I would like to know is: Is this a labor dispute, strictly and purely?

Mr. Sirignano: Mr. Wall, we are conducting an investigation to determine the true nature of this work stoppage.

Judge Wall: To determine the true nature?

Mr. Sirignano: Until we get the facts, we will be unable to determine that.

Judge Wall: I don't know too much about this. I came here kind of quickly. But, I read the papers and I understand that the president of a shipping company has (4) made a statement that he intends to sue Mr. Murphy and —what's the local?

Mr. Murphy: 306 and 881.

Judge Wall: 306 and 881. In view of the pending litigation, I would think it would put Mr. Murphy in a very bad position to give any testimony, because there has been a threat of suit and this testimony may be basis for a suit. If there is any basis, it may arise here. And that in itself would jeopardize this man's rights under the 14th Amendment.

Mr. Sirignano: Judge Wall, you are saying now that because any statement he may give would prejudice his right in some civil litigation that you are advising your [fol. 283] client not to answer questions of a Governmental agency in a duly constituted investigation?

Judge Wall: I'm advising him that his rights should be protected under the 14th Amendment in view of the threats of action by a party to this particular situation.

Mr. Sirignano: Judge Wall, this is a Governmental agency and the actions of this (5) agency in conducting an investigation, cannot, in any ways be affected by the intentions of private people.

Now, we're conducting our investigation here. Mr. Murphy has certain rights granted under the Constitution. Where they apply to our investigation, they'll be respected.

There's no relevancy between a pending suit between private litigants and an investigation conducted by this Commission.

Judge Wall: But I don't see where there's any relevancy concerning a labor dispute with this particular Bi-State agency. I think it's an NLRB situation.

Mr. Sirignano: That is what we are asking questions to determine, the true nature of this work stoppage, to see whether it's a labor dispute or whether there's violations of both the criminal law or the compact.

Now, we're not going to know that until we get the facts from all sources and Mr. Murphy is one of the sources.

Judge Wall: Well, there's nothing wrong here, you say, except a work stoppage?

(6) Mr. Sirignano: I didn't say anything of the sort. I don't know if there is anything wrong at this point. We haven't got all the facts yet.

[fol. 284] Judge Wall: Is there any basis to hold the investigation and not let this matter go through its proper channels with the National Labor Relations Board? That's a Governmental agency.

Mr. Sirignano: This Commission has the power to conduct an investigation regardless of the authority or the jurisdiction of the National Labor Relations Board if it effects the Compact.

Judge Wall: Provided that they do not infringe upon a man's rights. I mean we have to protect the man's rights.

Mr. Sirignano: That's absolutely right, but the rights you raised are that he is not protected. He is to answer questions or to claim the right of self incrimination. But if you raise an objection against it because he might be adversely effected in a civil litigation, that is no bar to his (7) testifying here.

Judge Wall: Well, I don't agree with you. I'd like an opportunity to check it.

Mr. Sirignano: A work stoppage is pending. It's a question of finding out what the facts are, as quickly as we can, and if there's some action to be taken, we have to do it.

We cannot delay it any longer. It's already since Monday that it's going on, not yesterday or today.

Judge Wall: Well, if it's a labor dispute, Mr. Sirignano, why not let the NLRB do the job?

Mr. Sirignano: We don't know that yet.

Judge Wall: I don't think you have jurisdiction in this matter. I want to check it.

Mr. Sirignano: Mr. Wall, we may not have jurisdiction ultimately, if the facts show it's just a labor dispute, but on the other hand, we have the jurisdiction to find out [fol. 285] what the facts are, and we are having a fact finding investigation.

(8) Judge Wall: You're having a fact finding investigation to see if you have jurisdiction.

Mr. Sirignano: To see if there's any violation of the Compact.

Judge Wall: This is a labor dispute, Mr. Sirignano, and you have no jurisdiction. You're looking for jurisdiction, according to your own statement.

Mr. Sirignano: Mr. Wall, I'm going to ask Mr. Murphy some questions. You can put your objections on the record, as to whether you are going to permit him or advise him to answer the questions or not, and if we feel that after he has taken that position he is in contempt, we'll proceed to contempt. That's the choice you have to make. Either you are going to have to answer the questions or raise a rightful privilege to refuse him to answer, and I assure you he will have to answer.

Judge Wall: I note my objection on the record that this is a pure and simple labor dispute. That the Bi-State does not (9) have any jurisdiction. There are no charges pending here, and it's strictly to find certain facts out, if there are any, if they exist, to obtain jurisdiction. And, that is putting the cart before the horse, in my humble opinion.

Mr. Sirignano: Do you wish to note any further objections?

Judge Wall: That's it.

Q. Mr. Murphy, what is your present position or occupation?

Judge Wall: Where's that subpoena?

(Mr. Sirignano hands subpoena to Judge Wall.)

[fol. 286] Judge Wall: Good. Go ahead, tell him your position.

A. Business agent of Local Number 2.

Q. Is that a local that has recently been merged with 881 and another local?

A. That's right.

Q. What was the other local?

A. 306.

Q. Now, as business agent of Local Number 2 in Hoboken—is that correct?

(10) A. That's right.

Q. Are you a representative of the longshoremen who work at the American Export Line, Hoboken Piers?

Judge Wall: I'll object to that, on this theory: I think it should be rephrased— Do any of the members of his union work on that pier.

Q. I'll rephrase the question.

Do any members of your local work on the American Export Piers in Hoboken?

A. They do.

Q. And those that work there, you represent them as a union agent; is that correct?

A. At times.

Q. Well, if your fiduciary relationship to these union members to represent them in labor matters at this pier is—

Judge Wall: I object to that, the word fiduciary.

Mr. Sirignano: We'll rephrase the question.

Q. As business agent of your union, is it your (11) responsibility to represent the people working there who are members of your union in labor matters?

Judge Wall: Go ahead, answer it.

A. Yes.

Q. Now, in connection with the American Export Line are you aware that on Monday, May the 16th the men failed to show up for work?

[fol. 287] Judge Wall: I object to that.

Mr. Sirignano: What are your grounds for objection to that?

Judge Wall: He can't talk for everybody that appeared there. They might have showed up for work.

Mr. Sirignano: I'm only asking his knowledge, Mr. Wall.

Q. Are you aware that they didn't show up for work?

Judge Wall: His men, not everybody on the pier.

Mr. Sirignano: I'll rephrase the question.

Q. Do you know that the pier did not work on Monday last?

Judge Wall: Answer.

A. Yes.

(12) Q. Did you have any prior knowledge, Mr. Murphy, that the pier would not work on Monday?

Judge Wall: Did he have any prior knowledge that the pier would not work on Monday? Answer.

A. No.

Q. What was the first you heard that things were not normal at Piers A, B and C, Hoboken, Monday morning?

Judge Wall: Answer.

A. Do you mind repeating the question?

(Question read back by the stenographer.)

A. I would say ten days previous.

[fol. 288] Q. Who was the source of that knowledge, Mr. Murphy?

Judge Wall: I'll have to object to that.

Mr. Sirignano: What's your objection this time, Mr. Wall?

Judge Wall: That's irrelevant. It has no bearing on anything.

Q. You're directed to answer the question.
A. (No answer.)
(13) Q. Mr. Murphy, are you thinking about the answer? It's been about three minutes now since I put the question to you.

Judge Wall: What's the queston?

Q. I'm asking you the question. Don't look to Counsel for answers.

Judge Wall: I objected to it. He directed you to answer. Now, it's entirely up to you.

A. Repeat the question.

(Question read back by stenographer.)

A. I don't remember.
Q. How did you find out that there would be trouble ten days later?

Judge Wall: I object to that. That's a standing objection from the beginning.
Mr. Sirignano: Your objection is noted.

Q. You are directed to answer.
A. Excuse me for a minute.

Mr. Sirignano: Yes, sir.

[fol. 289] (Off the record discussion held between (14) Mr. Murphy and his counsel.)

Mr. Sirignano: On the record.

A. It was common knowledge. It was released through some sources and everybody knew.
Q. Tell us just what you heard through common knowledge, Mr. Murphy. To be specific, was it related to the appointment of Markley as an employee of American Export Lines?
A. (No answer.)
Q. Did you understand the question?
A. I understand the question.
Q. I don't suppose it's any secret to you if everybody else was saying it on the piers?

A. That's right.

Q. So, tell us about it.

A. I got to watch what I say here.

Q. If you speak the truth, you don't have to.

A. Yes, I do, when you're doing business with people like the Export.

Judge Wall: See—you want to take this off the record? He's threatened with a suit. He's threatened with everything, as usually happens in strike situations, to get it settled. Now, for him to come over (15) here and testify when this should be before the National Relations Board, I don't think it's fair to this man.

Mr. Sirignano: Mr. Wall, what you are saying is just as a man may be sued simply for a criminal act, the criminal prosecution should stop until the civil suit is settled.

Judge Wall: No, there's no crime here.

Mr. Sirignano: We don't know, there may very well be a crime here.

[fol. 290] Judge Wall: But you're looking for jurisdiction over something. You don't know if you have it.

Mr. Sirignano: You don't know if there's a crime, only after you collect the facts and investigate.

Judge Wall: Well, it's common knowledge, what went on there. I read it in the newspaper. The first time I heard of a subpoena was yesterday when I was in court. I haven't had time to properly get into this picture.

Mr. Sirignano: Mr. Wall, we haven't (16) started on this investigation ten minutes before you came here. We've been investigating this since last Monday.

Judge Wall: Yes, but that isn't the point. I got here, and have to protect my client, and I can't protect him if I don't know what you are looking for.

Mr. Sirignano: Mr. Wall, Mr. Murphy is a very intelligent person. You've had an opportunity to confer with him.

Judge Wall: For five minutes? I was here at two o'clock.

Mr. Sirignano: You have had every opportunity to confer with him before you came here.

Judge Wall: When? I was told about this yesterday and I was in court and busy until one o'clock.

Mr. Sirignano: Mr. Murphy knew that he had to make an appearance here today as of yesterday, and he contacted you.

Judge Wall: That's true, and that's when he called me. I requested an adjournment until today. Now, I request an adjournment (17) to take care of this thing. To go into it.

[fol. 291] Mr. Sirignano: Mr. Wall, I will give you—how much time do you need with your client? We'll recess until you confer with him.

Judge Wall: About twenty-five minutes.

Mr. Sirignano: Very well, go in the library and sit down with your client and advise yourself of the facts in this case, and let's go on with this proceeding.

We will recess for twenty-five minutes.

Judge Wall: I don't think that's fair. In twenty-five minutes we're going to go through that whole thing? You've been investigating for three days. In twenty-five minutes I'm supposed to go through this picture and find out what it's all about. You haven't done it in three days.

Mr. Sirignano: I've talked to many, many witnesses. You've only got one person to talk to. Go ahead, take twenty-five, thirty-five or forty-five minutes. Confer with your client and let's get on with this proceeding. You say you haven't had a (18) chance to amply prepare yourself?

Judge Wall: No.

Mr. Sirignano: Mr. Wall, I asked how long it would take you, and you said it would take twenty-five minutes.

Judge Wall: I'll take it, but I don't think I can do it.

(Short recess held.)

(Interviewed continued at 3:30 and at this time Assistant Counsel Anthony Piazza was present in the room.)

Judge Wall: We have come to the conclusion that there be no further testimony, on the grounds that we [fol. 292] question the jurisdiction, and we say this is purely a labor dispute.

Mr. Sirignano: In other words, Mr. Murphy is going to take the position to any questions that I put to him that he refuses to answer on the grounds that the Commission has no jurisdiction to ask these questions; is that correct, sir?

Judge Wall: Has no jurisdiction in this matter at all.

(19) Mr. Sirignano: And, therefore, we cannot ask the questions and we should not expect an answer; is that correct, sir?

Judge Wall: Yes.

Q. Mr. Murphy, is that your position?

A. That's right.

Q. You are going to refuse to answer, on the grounds that the Commission does not have the jurisdiction to conduct this investigation; is that correct, sir?

Judge Wall: In this particular labor dispute.

Mr. Sirignano: In the investigation as related to in this record in the interrogation.

Judge Wall: Coupled with the fact that you yourself said that you do not know whether you are in it or out of it.

Q. Is that correct, Mr. Murphy?

A. That's right.

Q. You do not claim to assert your right against self incrimination, is that correct; sir?

Judge Wall: He doesn't take the Fifth (20) Amendment, no.

Q. Is that right?

Mr. Sirignano: I want it from Mr. Murphy.

A. That's right.

[fol. 293] Q. You're not taking the Fifth Amendment, you are not claiming that any of these questions will self incriminate you?

A. No.

Judge Wall: You're not taking the Fifth Amendment?

Mr. Murphy: No.

Q. Mr. Murphy, any future questions that I ask you, you will take that same position?

A. That's right.

Q. Now, for the record, Mr. Murphy, did you have anything to do with causing the strike that is presently pending at the American Export Line?

Judge Wall: He is not answering.

A. I am not answering.

Q. On the same grounds?

(21) A. That's right.

Q. Did you, in any way, participate in this work stoppage to compel the American Export Line to discharge, or to limit the duties of an employee by the name of James Markley?

A. I'm not answering.

Q. On the same grounds?

A. Yes.

Mr. Sirignano: No further questions. (3:37 P.M.)

[fol. 294] Clerk's Certificate to foregoing papers (omitted in printing).

[fol. 295] [File endorsement omitted]

IN THE SUPREME COURT OF NEW JERSEY

No. 3930— September Term

Civil Actions

In the Matter of the Application

of

WATERFRONT COMMISSION OF NEW YORK HARBOR, to punish JOHN MOODY, SR., for failure to obey a Subpoena.

In the Matter of the Application

of

WATERFRONT COMMISSION OF NEW YORK HARBOR, to punish WILLIAM MURPHY for failure to obey a Subpoena.

ORDER FOR CERTIFICATION—October 8, 1962

Pursuant to Rule 1:10-1 it is Ordered that the appeal from the judgments entered in this cause on December 4, 1961, in the Superior Court, Law Division, now pending in the Superior Court, Appellate Division (A-263-61 and A-264-61), be certified directly to this Court, to the end that it may be reviewed by this Court; and it is further

Ordered that this cause shall be deemed pending on appeal in this Court, and that further proceedings herein shall be had in the same manner as provided for on appeals as of right, in accordance with the rules of this Court; and it is further

Ordered that all papers necessary to be filed in the cause by the parties hereto in the prosecution of this appeal, down to and including the entry of mandate, shall be filed by the Clerk of this Court without the payment to him of fees for such filing.

Dated October 8, 1962.

By the Court, Joseph Weintraub, Chief Justice.

IN THE SUPREME COURT OF NEW JERSEY

A-53, September Term 1962

In the Matter

of

THE APPLICATION OF THE WATERFRONT COMMISSION OF NEW YORK HARBOR, to punish JOHN MOODY, SR. for failure to obey a Subpoena.

In the Matter

of

THE APPLICATION OF THE WATERFRONT COMMISSION OF NEW YORK HARBOR, to punish WILLIAM MURPHY for failure to obey a Subpoena.

Argued January 7, 1963

Mr. Harold Krieger argued the cause for the Defendants-Appellants, John Moody, Sr. and William Murphy. (Messrs. Krieger & Chodash, Attorneys; Mr. Robert Wall, of counsel, and Mr. Harold Krieger on the brief.)

Mr. Robert A. Pin and Mr. Irving Malchman argued the cause for the Waterfront Commission of New York Harbor. (Mr. William P. Sirignano and Mr. Irving Malchman (both of the New York Bar) on the brief.)

OPINION—Decided March 4, 1963

The opinion of the court was delivered by

PROCTOR, J.

This is a consolidated appeal from two judgments of the Superior Court, Law Division, adjudging each of the defendants, John Moody, Sr., and William Murphy, guilty of civil and criminal contempt for failing to testify pursuant to subpoenas issued by the Waterfront Commission of New York Harbor (Commission). The judgments fined the defendants $50.00 each and sentenced them to 30 days in jail. The judgments further ordered that the subpoenas be obeyed by the giving of responsive answers before the [fol. 297] Commission to the questions set forth therein, and that the defendants be incarcerated until they answer those questions. The judgments also provided for a stay of execution pending appeal, the defendants having previously posted bonds.

We certified the defendants' appeal before argument in the Appellate Division.

This is the second time that the defendants have been adjudged in civil contempt for their refusal to testify pursuant to the aforementioned subpoenas. Briefly, the history of this litigation is as follows: One James H. Markley was an investigator for the Commission, assigned principally to cover the piers of the American Export Lines in Hoboken, New Jersey. On or before May 16, 1960, Markley left the employ of the Commission in order to work for the American Export Lines as a security officer, and obtained a license from the Commission to operate as a port watchman. On Monday, May 16, 1960, the day Markley commenced work for the American Export Lines on its Hoboken piers, the longshoremen employed by American Export Lines on those piers did not report for work. This work stoppage, except for the morning of Tuesday, May 17, continued through Friday, May 20, 1960. The striking employees were members of Hoboken Local No. 2 of the International Longshoremen's Association (ILA). The defendant Moody is an organizer of the ILA in New Jersey, and the defendant Murphy is the business agent of Local No. 2.

Under our Waterfront Commission Act, *N.J.S.A.* 32:23-1 *et seq.* (the New York counterpart is *New York Laws* 1953, c. 882, c. 883), the longshoremen who participated in this work stoppage are required to be and are registered with the Commission. *N.J.S.A.* 32:23-27. Also, under the Act, Markley, as a security officer of American Export Lines, is required to be licensed as a port watchman. *N.J.S.A.* 32:23-39.

[fol. 298] The Commission had information that the work stoppage was "a concerted effort to keep James H. Markley off the piers of the American Export Lines." Accordingly, the Commission instituted an investigation to determine whether any persons registered with or licensed by the Commission were violating the Waterfront Commission Act by coercing an employer to limit the functions of, or to discharge, a licensed port watchman. In connection with its investigation, the Commission duly served the defendants with subpoenas on May 18, 1960, ordering them to appear and testify at the Commission's offices in New York City. The defendants appeared at the offices of the Commission in response to the subpoenas on May 19,,1960. At the hearing, Moody, after giving his name and address and testifying that he was a union official, refused to answer any further questions. Murphy testified that he was business agent of Local No. 2 and represented members of the local working at the Hoboken piers of the American Export Lines. He said he knew that the longshoremen did not work on May 16, 1960, and that it was common knowledge that for some time before that day things were not normal at the American Export Lines. However, he refused to say whether those conditions were related to the employment of Markley as a port watchman, and he refused to answer any other questions. Both defendants expressly declined to assert their privilege against self-incrimination, although they were specifically asked if that was one of the grounds for their refusal to testify. The primary reason for their refusal to testify was their assertion that the Commission had no statutory authority to investigate the work stoppage because it involved a labor dispute over which the National Labor Relations Board had exclusive jurisdiction.[1]

[fol. 299] Thereafter, the Commission instituted contempt proceedings against the defendants in the Superior Court, Law Division, which resulted in judgments dated June 20, 1960, holding the defendants guilty of civil contempt and ordering that they be fined $50.00 each and that they be incarcerated until they obeyed the Commission's subpoenas.

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[1] On defendants' appeal from the first judgment holding them in contempt (*In re Application of Waterfront Comm. of N.Y. Harbor*, 35 N.J. 62 (1961)), defendants' other stated reasons for their refusal to answer were not urged as a ground for reversal.

These judgments were affirmed by this court, and the United States Supreme Court dismissed the defendants' further appeal and also denied *certiorari*. *In re Application of Waterfront Comm. of N.Y. Harbor*, 35 N.J. 62 (1961), *appeal dism'd and cert. den. sub nom. Murphy* v. *Waterfront Commission of New York Harbor*, 368 U.S. 32, 7 L.ed. 2d 91 (1961).

Pursuant to the mandate of this court in the above contempt proceedings, the defendants appeared before the Superior Court, Law Division, on October 3, 1961. The court directed the defendants to appear before the Commission pursuant to the May 1960 subpoenas. Later that day, the defendants appeared at the offices of the Commission as directed. However, except to give their names, addresses and occupations, the defendants again refused to answer any questions, this time upon a number of new objections including the privilege against self-incrimination. All of the objections were overruled by the Commission except the assertion of the privilege against self-incrimination. The hearing was then adjourned and the subpoenas were continued until October 10, 1961, so that the Commission could decide whether to grant the defendants immunity from prosecution pursuant to *N.J.S.A.* 32:23-86(5) of the Waterfront Commission Act, and if so, to afford the Commission an opportunity to give notice to the appropriate officials as required by that subdivision.

On the following day (October 4, 1961) the defendants and the Commission's representative appeared before the [fol. 300] Law Division. The court found that the defendants had obeyed the subpoenas, and that their assertion of the privilege against self-incrimination had been recognized by the Commission as a valid basis for their refusal to answer the Commission's questions. The court held that, since the defendants had complied with the judgments of the court entered June 20, 1960, they had purged themselves of contempt. However, the court also directed that the defendants should continue to be subject to the subpoenas, and that the defendants appear before the Commission on the adjourned return date (October 10, 1961).

The return date of the subpoenas was further adjourned with the consent of the parties until October 27, 1961, at which time the defendants appeared at the offices of the Commission. At the outset of this meeting, Myles J. Ambrose, Executive Director of the Commission announced, "The purpose of the meeting is to inquire into violations of the Compact in connection with a work stoppage in May, 1960, at the American Export Line piers in Hoboken, New Jersey."

The following documents were made part of the record: (1) letters (pursuant to *N.J.S.A.* 32:23-9) from the Commissioners designating Ambrose and William P. Sirignano, the Commission's General Counsel, to act in the places of Commissioners Harold R. Tyler, Jr., and David C. Thompson in the investigation wherein Murphy and Moody were subpoenaed, and to confer immunity upon them pursuant to *N.J.S.A.* 32:23-86(5); (2) copies of letters sent pursuant to *N.J.S.A.* 32:23-86(5) to the Attorneys-General of New York and New Jersey, to the District Attorney of New York County and to the Prosecutor of Hudson County, together with certificates of mailing, notifying them of the Commission's intention to confer immunity upon Murphy and Moody; and (3) letters of reply received from all of the above-named officials except the Prosecutor of Hudson [fol. 301] County stating that each had no objection to the Commission's proposed grant of immunity to the defendants. No reply was received from the Prosecutor of Hudson County.

Counsel for the defendants objected to the legality of the proceedings on the ground that the Commissioners could not delegate the power to grant immunity to their designees, Ambrose and Sirignano. They also challenged the adequacy of the letters of notice sent to the officials of the two States. They further demanded a statement apprising them of the purpose and pertinency of the interrogation, contending that the Commission's failure to give them such a statement deprived them of due process of law. All these objections and demands were rejected.

Thereafter, the defendants each took the stand and, after stating his name and address, each refused to answer any further questions on the ground that his answers might tend to incriminate him. Thereupon the Commissioners' designees granted immunity to each of the defendants pursuant to *N.J.S.A.* 32:23-86(5) against prosecution in the

States of New York and New Jersey concerning any transaction to which they would testify, and directed the defendants to answer each of the questions. All of the questions pertained to the defendants' knowledge or actions in connection with the May 1960 work stoppage. The defendants again refused to answer for all of the reasons stated above, and particularly because the grant of immunity did not protect them against federal prosecution.

The Commissioners' designees expressly recognized that the grant of immunity did not extend to federal prosecution, but nevertheless directed the defendants to answer, saying that there was no requirement that the immunity extend that far. Upon the defendants' further refusal to answer, the Commissioners' designees directed the attorney for the [fol. 302] Commission to institute contempt proceedings against the defendants.

The Commission initiated the present proceedings by moving before the Law Division that the defendants "be punished as for a civil and criminal contempt of court." Annexed to the moving papers were numerous exhibits depicting the prior history of the matter and including transcripts of the proceedings before the Commission on October 3, 1961, and October 27, 1961. In response to the Commission's motions, the court issued orders on November 1, 1961, directing the defendants to show cause why they should not be punished as for a contempt of court. The defendants filed an answer to the Commission's motions in which they denied all the allegations, and raised the following separate defenses: (1) failure of the Commission to grant immunity against federal incrimination; (2) improper delegation by the Commission of the power to confer immunity; (3) insufficient notice to the officials of the respective States; (4) failure to explicitly confer immunity as to each question asked; (5) preemption of the subject matter of the investigation by the Federal Labor Management Relations Act; and (6) inadequate apprisal of purpose and pertinency, resulting in a denial of due process of law. The defendants also moved for a bill of particulars or, in the alternative, an order requiring answers to interrogatories. These discovery motions sought to compel the Commission, in effect, to produce for the defendants' inspection its entire investigative files relating to the work stoppage investigation, including intra-office communications as well as communications between the Commission and any state or federal officials. Defendants also demanded a jury trial and, lastly, moved to quash the subpoenas as having been exhausted when the defendants were purged of their prior contempt.

[fol. 302a] The matter was heard before the Law Division on November 21 and 22, 1961. The court heard extensive argument from both sides on the above motions and defenses. However, the trial judge announced that he was "not going to receive any testimony," and said he was "going to decide it [the case] on the record as I've got it." Later the court reconsidered its ruling and concluded that it would receive the testimony of the defendants for the limited purpose of pinpointing their fear of possible federal incrimination. Murphy's testimony concerning the basis for his fear of federal incrimination was as follows:

> "Q. What crimes could you possibly have been connected with as to result in a Federal charge against you or others, in combination with others, in conspiracy with others? A. That the American Export Lines is subsidized by the United States Government and could be sued, the union could be sued, and I could be sued, personally. Interstate commerce freight that was held up during the strike would bring in the Federal Bureau of Investigation, and the rights of watchmen working on the piers that could be in cahoots in pilferages, and stuff like that.
>
> Q. Also, were you aware of the fact it was the contention of the Waterfront Commission that you tried, and others together, in combination and conspiracy, to keep an individual from employment on the piers, namely, Mr. Markley? A. That's right.
>
> Q. And was that a reason for your exercising that privilege, yourself? A. That's right."

Moody's testimony concerning the basis for his fear of federal incrimination was as follows:

"Q. And you exercised your privilege as you have just testified out of fear of incrimination of any Federal laws? A. That's right.

Q. Will you tell the Court what you feared and pinpoint them and the respect? A. First, from the Waterfront Commission, they have, what they say, the right and authority to question. Now, there's, we say, pilferage, that they say, work stoppage, we had to do with the pilferage and we had to do with the work stoppage; and the watchmen being not in the ILA, outside the ILA, that we tried to tell the watchmen what to do and [fol. 303] what not to do, and to stop this one gentleman from getting hired on the pier. We don't do that, your Honor.

• • • • • • •

Q. You have just testified that the American Export Lines are engaged in interstate commerce, is that correct? A. That's right.

Q. And that this stoppage, as contended by the Waterfront Commission was an illegal stoppage, was an interference with interstate commerce? A. That's right.

Q. And is that why you fear incrimination? A. That's right.

Q. And that it could lead to other evidence and tend to lead to other evidence that could possibly incriminate you? A. That's right."

The Law Division held that the Commissioners' designees had power to confer immunity on the defendants; that the Commission's letters to the officials of New York and New Jersey constituted adequate notice under the statute of its intention to confer immunity upon the defendants; that the defendants were adequately apprised of the subject matter of the investigation; and that the Commission was not required to grant the defendants immunity from federal prosecution. The court also expressed its doubt of the sincerity of the defendants' fear of federal criminal involvement. The court found the defendants guilty of both civil and criminal contempt. The court then disposed of the various motions of the defendants, *i.e.*, the motion to quash the subpoenas, the motions for discovery, and the motion for jury trial, saying:

> "Those motions were motions directed to the discretion of the Court. However, the disposition of the matter on its merits finally disposed of them, but even in the exercise of discretion, none of those motions would be granted by this Court. So all the other motions are respectfully denied."

The court deferred imposition of sentence in order to secure a presentence report from the probation department.

[fol. 304] At the time of sentencing, the defendants' counsel urged that the court on October 4, 1961 had purged the defendants of their original contempt, and that thereafter in the proceedings before the Commission the defendants merely asserted their rights upon novel questions of law. The court noted that the defendants had refused to answer the questions in issue upon three different occasions, to wit, May 19, 1960, October 3, and October 27, 1961. Though the court believed that the defendants had a "perfect right to interpose whatever legal objections were at their command," nonetheless the court was "constrained to believe that there has to be and there now is, at least for the present, an end to these witnesses being asked these questions." The court directed the Commission to prepare an order which would set out verbatim the questions that the defendants had refused to answer and which would order the defendants to stand committed until they responsively answered the questions; and the court further fined the defendants each $50.00 and sentenced them to jail for 30 days. The court also stated that the defendants, upon answering the questions, could apply to the court for an order purging them of contempt.

On this appeal, the defendants first point out that under the *Evidence Act, 1960* (*N.J.S.A.* 2A:84A-1 *et seq.*), the privilege against self-incrimination expressly extends to federal incrimination. They argue that since the Waterfront Commission declared that its grant of immunity to the defendants did not and could not extend to federal prosecutions, the Commission's orders to answer were in violation of the aforesaid Act.

The Commission argues that the defendants waived the privilege against self-incrimination by expressly declining to assert it at the first hearing before the Commission on [fol. 305] May 19, 1960. The Commission further argues that since the defendants contended in the first contempt proceeding that the Commission's investigation constituted an unlawful interference with innocent conduct, *i.e.*, a labor dispute over which the National Labor Relations Board has exclusive jurisdiction, they are estopped from taking the inconsistent position in the present contempt proceeding that their testimony might implicate them in illegal conduct under federal law.

Though we think the defendants should have raised all their reasons for their refusal to answer, including the privilege against self-incrimination, at the hearing before the Commission on May 19, 1960, or at least in the contempt proceedings in the Superior Court which resulted in the judgments of June 20, 1960 holding them in contempt, we think that in the circumstances of this case the defendants should not be precluded from raising the issue of the privilege against self-incrimination. The Commission recognized the defendants' right to assert the privilege at its hearing of October 3, 1961, and the trial court on October 4, 1961 also recognized their right when it purged them of their original contempt. Moreover, at its hearing on October 27, 1961, the Commission clearly recognized the defendants' right to assert the privilege when it granted them immunity against prosecution. Finally, the contentions of waiver and estoppel were never raised by the Commission in the court below and therefore it may not raise them for the first time in this court.

We return to the defendants' argument regarding the validity of the Commission's grant of immunity. The Waterfront Commission Act is an interstate compact, enacted by the States of New York and New Jersey in 1953 with the consent of Congress, 67 Stat. 541, Act of Aug. 12, 1953, c. 407, in order to eliminate evil conditions on the waterfront in the Port of New York Harbor. The Compact [fol. 306] creates the Waterfront Commission as an agency of both States, with authority to license or register workers, and for good cause to refuse licenses and registrations, and to regulate labor and hiring practices on the waterfront. In order to further the elimination of waterfront evils, the Commission is empowered to investigate waterfront practices and other matters bearing on the objectives of the Compact, and to make recommendations to two States for the improvement of waterfront conditions and for the effectuation of the purposes of the Compact. The members of the Commission and its properly designated officers may administer oaths and issue subpoenas throughout both States to compel the attendance of witnesses, the giving of testimony, and the production of other evidence. *N.J.S.A.* 32:23-10. "Witness" is defined in the Compact as "any person whose testimony is desired in any investigation, interview or other proceeding conducted by the commission pursuant to the provisions of this act." *N.J.S.A.* 32:23-85. Failure to obey a subpoena of the Commission is made punishable by the Superior Court in New Jersey and the Supreme Court in New York "in the same manner as said failure is punishable by such court in a case therein pending." *N.J.S.A.* 32:23-62. See also, *R.R.* 4:46-5(c). For a history of this bi-state legislation see *Hazelton* v. *Murray*, 21 N.J. 115 (1956); *In re Application of Waterfront Com.*, 32 N.J. 323 (1960).

Under *N.J.S.A.* 32:23-86(5) of the Waterfront Commission Act, the Commission has explicit statutory power to grant immunity from prosecution in order to obtain the testimony of a witness who refuses to testify upon the ground of self-incrimination. That subdivision grants the Commission the power:

> "(5) To confer immunity, in the following manner: In any investigation, interview or other proceeding conducted under oath by the commission or any duly au- [fol. 307] thorized officer, employee or agent thereof, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made upon 24 hours' prior written notice to the appropriate Attorney-General of the State of New York or the State of New Jersey, and to

the appropriate district attorney or prosecutor having an official interest therein, by the unanimous vote of both members of the commission or their designees appointed pursuant to the provisions of section 3 of article III of this act, that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this subdivision, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein.

" 'Immunity' as used in this subdivision means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by the unanimous vote of both members of the commission or their designees appointed pursuant to the provisions of section 3 of article III of this act, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt.

"Immunity shall not be conferred upon any person except in accordance with the provisions of this subdivision. If, after compliance with the provisions of this subdivision, a person is ordered to answer a question or produce evidence of any other kind and complies with such order, and it is thereafter determined that the appropriate Attorney-General or district attorney or prosecutor having an official interest therein was not notified, such failure or neglect shall not deprive such person of any immunity otherwise properly conferred upon him."

Section 3 of Article III, referred to in the above-quoted subdivision, reads in pertinent part as follows:

> [fol. 308] "The commission shall act only by unanimous vote of both members thereof. Any member may, by written instrument filed in the office of the commission, designate any officer or employee of the commission to act in his place as a member whenever he shall be unable to attend a meeting of the commission." *N.J.S.A.* 32:23-9.

The immunity subdivision quoted above was enacted in 1956 in New Jersey (L. 1956, c. 194) and in 1957 in New York (*New York Laws* 1957, c. 188) as an agreement between the two States supplementary to the Waterfront Commission Compact and amendatory thereof. This legislation was enacted pursuant to the provisions of Article XVI, Section 1 of the Compact empowering the Legislature of either State, when concurred in by the Legislature of the other, to enact amendments and supplements to the Compact. *N.J.S.A.* 32:23-70. Thus, the immunity subdivision is in effect a part of the original Waterfront Commission Compact, to which Congress gave its consent.

N.J.S.A. 32:23-86(5), the immunity subdivision, is substantially the same as, and in fact was patterned after, § 2447 of the New York Penal Law. In the statement appended to S-385, which became Chapter 194 of the Laws of 1956, the purpose of the then-proposed subdivision was declared as follows:

> "[It] [a]uthorizes the 2 commissioners, acting unanimously, to grant immunity from criminal prosecution in connection with any commission investigation or proceeding, but only after notifying the appropriate prosecutor and Attorney-General and giving them an opportunity to point out why, in the particular case, the granting of immunity would not be in the public interest. Heretofore, a number of important investigations conducted by the commission in an effort to identify the real principals in kickback and other rackets

> on the waterfront have been thwarted by a valid claim of privilege against self-incrimination made by underlings. The commission could unseal such lips by granting immunity and compelling testimony from such underlings in cases where the public interest would thereby be served.
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> [fol. 309] "The language of the section is practically identical with the provisions for granting immunity as codified through the efforts of the New York State Crime Commission and set forth in Section 2447 of the Penal Law of New York."

The United States Supreme Court has held that § 2447 of the New York Penal Law is valid notwithstanding a contention that it is unconstitutional to require a witness to testify upon the grant of immunity thereunder, where such witness' testimony might be used in a federal prosecution against him. *Knapp* v. *Schweitzer,* 357 U.S. 371, 2 L.ed.2d 1393 (1958). In that case Mr. Justice Frankfurter, speaking for the Court, said:

> "In these days of the extensive sweep of such federal statutes as the income tax law and the criminal sanctions for their evasions, investigation under state law to discover corruption and misconduct, generally, in violation of state law could easily be thwarted if a State were deprived of its power to expose such wrongdoing with a view to remedial legislation or prosecution." *Id.,* 357 U.S. at 378-379, 2 L.ed.2d at 1400.

In *Dunham* v. *Ottinger,* 243 N.Y. 423, 438, 154 N.E. 298, 302 (1926), the New York Court of Appeals, in answer to a contention that an immunity statute of that State was insufficient because it did not preclude the use of the testimony in federal criminal proceedings, said:

> "It [the statute] does give ample protection against the use of such testimony in our own tribunals, and it is perfectly well established that this is a sufficient immunity; that all that the state is required to or can do

> is to give immunity against its own processes, and, if it has done that, as this statute does it, it has satisfied the requirements of the Constitution."

The above rule has been stated by the United States Supreme Court in *United States* v. *Murdock,* 284 U.S. 141, 149, 76 L.ed. 210, 213 (1931):

> "[T]he lack of state power to give witnesses protection against federal prosecution does not defeat a state immunity statute. The principle established is that full [fol. 310] and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination."

This rule has been recognized or followed in nearly all of the states in the nation, including New Jersey where the privilege against self-incrimination rests solely on a statutory and common law foundation. See *In re Pillo,* 11 N.J. 8, 16 (1952), and authorities cited therein. It is clear that prior to the enactment of the *Evidence Act, 1960* (*N.J.S.A.* 2A:84A-1 *et seq.*), the Waterfront Commission was empowered by virtue of the immunity subdivision to compel a witness, upon whom immunity had been conferred, to testify notwithstanding a claim by the witness of a fear of federal prosecution. See *In re Pillo, supra; Nusbaum* v. *Newark Morning Ledger Co.,* 33 N.J. 419, 424 (1960).

The defendants contend, however, that the above statement of law has been changed by virtue of the enactment of Rule 24 (*N.J.S.A.* 2A:84A-18) of the *Evidence Act, 1960* which expressly extends the privilege to matters which might tend to incriminate a witness under the laws of "this State, or another State or the United States," unless "it clearly appears that the witness has no reasonable cause to apprehend a criminal prosecution."[2] See *Nusbaum* v. *New-*

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[2] It must be noted that the privilege against self-incrimination accorded to a witness by the laws of New York extends only to crimes against that State, so that a grant of state-wide immunity is sufficient to compel testimony notwithstanding a claim of federal incrimination. *Waterfront Commission* v. *Marchitto,* 217 N.Y.

ark Morning Ledger Co., supra, at 424. They further point out that Rule 2(1) (*N.J.S.A.* 2A:84A-16(1)) provides:

> "(1) The provisions of article II, Privileges [which include Rule 24], shall apply in all cases and to all proceedings, places and inquiries, whether formal, informal, public or private, as well as to all branches of government and by whomsoever the same may be conducted, and none of said provisions shall be subject to being relaxed."

[fol. 311] The above rules obviously express a broad and liberal policy of our State to extend the scope of the privileges accorded to witnesses in this jurisdiction. However, the Legislature has recognized that the immediate implementation of such a policy might cause unforeseen conflicts with prior existing legislation, which would lead to undesirable consequences. Therefore, it has wisely chosen to proceed cautiously in a step-by-step manner, examining each piece of existing legislation which might be affected by a change in the scope of privileges, and allowing itself an opportunity to provide a specific legislative cure for any conflicts which might arise. Those existing statutes which the Legislature had already examined and wished to repeal were expressly mentioned in the *Evidence Act* as being thereby repealed. *N.J.S.A.* 2A:84A-45. The Legislature also provided that this court may adopt rules of evidence, *N.J.S.A.* 2A:84A-33, but it further provided that any such rules shall not supersede any law in conflict or inconsistent therewith unless the conflicting or inconsistent law "shall be expressly identified by footnote to any rule so adopted." *N.J.S.A.* 2A:84A-40. Furthermore, in order to make clear

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Supp. 2d 487 (A.D. 1st Dept. 1961), leave to appeal denied, 10 N.Y. 2d 813, 178 N.E. 2d 231 (1961), cert. den. 368 U.S 954, 7 L. ed. 2d 386 (1962); ***Commission of Investigation*** **v.** ***Lombardozzi,*** 180 N.Y. Supp. 2d 496 (A.D. 1st Dept. 1958), aff'd, 15 N.Y. 2d 1026, 158 N.E. 2d 250 (1959), 6 N.Y. 2d 878, 160 N.E. 2d 125 (1959), cert. den. sub nom. ***Miranda et al.*** **v.** ***Commission of Investigation of the State of New York,*** 360 U.S. 930, 3 L. ed. 2d 1543 (1959), appeal dismissed sub nom. ***Mancuso*** **v.** ***Commission of Investigation of the State of New York,*** 361 U.S. 10, 4 L. ed. 2d 50; see ***Knapp*** **v.** ***Schweitzer, supra.***

its intention to avoid any unforeseen impairment of some existing statute, the Legislature expressly provided in Rule 2(4) (*N.J.S.A.* 2A:84A-16(4)):

> "(4) The enactment of the rules set forth in this act or the adoption of rules pursuant hereto shall not operate to repeal any statute by implication."

In the *Report of the* [*Legislative*] *Commission to Study the* [fol. 312] *Improvement of the Law of Evidence* (1956), which is an authoritative guide to the interpretation of the *Evidence Act, 1960,* it was stated at p. 15 that Rule 2(4) (quoted above):

> ". . . has the effect of continuing all existing statutes. This Commission feels that it is necessary to review the New Jersey statutes in detail and to specifically treat each such statute dealing with evidence. Otherwise, a wholesale repeal of many statutes, without consideration of all the implications, would result."

In view of the above, it is clear to us that although the Legislature employed a broad brush in liberally extending the scope of the rules regarding privileges, it did not intend that, without further study and action, those rules should be applied as broadly as their language would otherwise permit or require. The question before us, therefore, is whether the expansion of the privilege against self-incrimination to include incrimination under federal law was intended by the Legislature to immediately impair the powers of the Waterfront Commission to investigate evil waterfront practices and to compel testimony after a grant of immunity from state-wide prosecution in New York and New Jersey. We think the Legislature had no such intention in mind when it passed the *Evidence Act, 1960.*

It is clear that in the formation of the Compact our Legislature, together with the Legislature of New York, intended to deal with joint problems existing throughout a single port area situated partly in New York and partly in New Jersey, and not with separate problems in separate ports of each State. From the standpoint of geography, commerce, and waterfront working conditions, New York Harbor is an organic whole, although politically, the harbor is split between the law-making authority of the two States. Plainly, these joint problems could not be adequately dealt with except through the coordinated efforts of the two States and the United States. The situation called for uni-[fol. 313] fied action. As a consequence, the Waterfront Commission, a single bi-state agency, was established with the consent of Congress to administer a joint legislative program throughout the Port of New York District, embracing the New York-New Jersey waterfront. Both States ceded certain governmental powers to this autonomous bi-state agency. These powers, as mentioned earlier in this opinion, include the power to make appropriate investigations, subpoena witnesses, and compel testimony after a grant of immunity against prosecution in both States. See *Application of Waterfront Comm. of N.Y. Harbor,* 30 N.J.Super. 33 (Law Div. 1956). The objectives of the Compact were to provide for uniform treatment of a unique, bi-state problem. Such niformity, in order to be effective, must be maintained throughout the life of the Compact. See Frankfurter and Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments,* 34 *Yale L. J.* 685, 698 (1925). In short, the Waterfront Commission, when acting within the orbit of the governmental responsibility which the States have expressly or by fair implication agreed to vest in it, was intended to be free from any unilateral restraint by either State which might thwart the Commission in its efforts to eliminate evil conditions in an area where there is extensive activity in international and interstate commerce. *Cf. State* v. *Murphy,* 36 N.J. 172, 186-187 (1961). Indeed, it is doubtful whether a single legislature could unilaterally impair the powers of the Waterfront Commission, even if it so desired. See *Green* v. *Biddle,* 8 Wheat. 1, 5 L.ed. 547 (1823); *President, Managers, &c.* v. *Trenton City Bridge Co.,* 13 N.J.Eq. 46 (Ch. 1860); see also, *Comment,* 45 *Yale L. J.* 324, 329 (1935).

If, as defendants contend, a witness may claim the privilege against self-incrimination with respect to federal crimes notwithstanding a conferral of bi-state immunity by [fol. 314] the Commission, it would follow that there could be no effective investigation not only of the state aspects of such crimes but even of the non-criminal aspects of waterfront conditions since possible federal criminal overtones are frequently present. This is so because of the nature of waterfront activity and its constant involvement with interstate commerce and other such areas of federal jurisdiction. Since the Commission cannot grant immunity as to the federal crimes it will remain helpless. The difficulty is not merely fanciful; it might well result that investigations by the Commission would be seriously hampered and, in many cases, frustrated.

Moreover, an interpretation of the Compact which is not uniform in both States would lead to results disruptive of the investigative process of the Commission. It might mean that different witnesses would have different rights depending on which side of the Hudson River they lived, or on which side the events in question took place. It might also mean that the same witnesses would have different rights depending on which side of the River they appear for examination or are prosecuted for contempt.[3] Certainly, our Legislature in adopting the *Evidence Act, 1960* never intended such results.

For the above reasons, we hold that Rule 24 of the *Evidence Act, 1960* does not entitle the defendants to refuse to testify after the Commission has conferred immunity upon them.[4]

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[3] See *Waterfront Commission* v. *Marchitto, supra,* where the defendant, a New Jersey resident, was successfully prosecuted in the New York courts for contempt arising out of his refusal to answer questions pertaining to his activities in New Jersey, propounded at a Commission hearing in New York City.

[4] Of course, it is not for us to say whether the Commission's grant of immunity would be honored in a federal criminal proceeding. In *Feldman* v. *United States,* 322 U.S. 487, 88 L. ed. 1408 (1943), *rehearing denied,* 323 U.S. 811, 89 L. ed. 646 (1944), it was held by a 4 to 3 vote that testimony of a defendant previously compelled under the sanctions of a state immunity statute could be used against him in a federal prosecution. If *Feldman* were overruled, and state-compelled testimony held inadmissible in the federal courts, a witness would be free to testify under a state immunity grant without running the risk of a subsequent federal prosecution based upon such compelled testimony. In Kroner, *Self Incrimination: The External Reach of the Privilege,* 60 Colum.

[fol. 315] In view of the above conclusion, it is unnecessary for us to pass upon the Commission's contention that the defendants failed to establish in the Superior Court a reasonable basis for their asserted fear of federal incrimination.

The defendants further contend that having purged themselves of contempt under the subpoenas returnable before the Commission at its first hearing in May 1960, those subpoenas were exhausted and could not be made the basis for the proceedings before the Commission on October 27, 1961. The subpoenas had been made returnable on May 18, 1960 "and at any adjourned date thereof." As mentioned earlier in this opinion, the defendants appeared before the Commission on October 3, 1961 and refused to testify upon the ground of self-incrimination. The Commission recognized the defendants' invocation of the privilege and adjourned the subpoenas until October 10, 1961, so that the Commission could decide whether to confer immunity from prosecution upon the defendants. The following day, October 4, 1961, the parties appeared before the Superior Court, which ruled that the defendants had purged themselves of their previous contempt. However, the court further ruled that the subpoenas were still in effect and noted that the Commission had adjourned the subpoenas until October 10, 1961. Counsel for the defendants agreed that they would appear at the appointed time, and the court entered an order to that effect. The hearing of October 10, 1961, was adjourned until October 27, 1961, with the [fol. 316] consent of all the parties, at which time the defendants appeared. Since the court ordered the defendants to appear and they consented to such order, and did appear before the Commission on October 27, 1961, their conten-

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L. Rev. 816, 837, n. 155 (1960), the author observes: "That this [overruling *Feldman*] is not unlikely is suggested by the fact that 4 Justices now on the Court appear to favor such a result. Justices Black and Douglas were among the dissenters in *Feldman*. See 322 U.S. at 494. Mr. Chief Justice Warren, in dissent and Mr. Justice Brennan, in a concurring opinion, indicated in *Knapp* v. *Schweitzer* that the time was ripe for review of the *Feldmcn* rule. See 357 U.S. at 381."

tion that the power of the subpoenas to compel their appearance had been exhausted is clearly without merit.

The defendants also contend that the Commission's grant of immunity was invalid because: (1) the letters sent by the Commission to the officials of New York and New Jersey advising them of the Commission's intention to confer immunity upon the defendants were not sufficiently informative "to enable those officers to arrive at any rational judgment as to whether the case is an appropriate one for concurrence by such law officers in the Commission's proposed granting of immunity"; (2) not all such law officers having an official interest in the subject matter were notified; (3) the Commissioners' appointment of designees to confer immunity upon the defendants was an improper delegation of power;[5] and (4) the Commission did not make the grant of immunity explicit as to each question asked.

N.J.S.A. 32:23-86(5) provides that the grant of immunity by the Commission shall be "upon 24 hours' prior written notice to the appropriate Attorney-General of the State of New York or the State of New Jersey, and to the appropriate district attorney or prosecutor having an official interest therein." Pursuant to this provision, the Commission mailed letters to the Attorneys-General of New York and New Jersey, the District Attorney of New York [fol. 317] County, and the Prosecutor of Hudson County. These letters set forth the Commission's intention to confer immunity upon the defendants in an investigation "into a strike that took place at the American Export Line Terminal in Hoboken, New Jersey on May 16 through May 20, 1960." The letters further recited the history of the proceedings, including the fact that the defendants refused to answer questions concerning their participation in the strike on the grounds that their answers might tend to incriminate them. Although there is nothing in the immunity subdivision requiring receipt of replies to the letters of notice, letters were received from both Attorneys-General and from the District Attorney of New York County, informing the Commission that these officials had no objections to the proposed grant of immunity to the defendants. (No reply was received from the Hudson County Prosecutor.)

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[5] The defendants hint that the Legislature could not constitutionally delegate to the Commissioners themselves the power to grant immunity. However, they do not press this point and in any event, we would not consider it since the Attorney-General was not notified that the constitutionality of a statute was under attack. R.R. 4:37-2; *Bergen County Sewer Authority* v. *Little Ferry*, 5 N.J. 548, 554 (1950).

Although, as said above, the defendants contend that the Commission's letters of notice were not sufficiently informative, they do not suggest what further facts would be necessary in the circumstances. Since the letters clearly informed the officials as to the specific nature of the inquiry, and gave them an opportunity to be heard if they saw fit in order that they might persuade the Commission to withhold the granting of immunity, we think the letters were amply sufficient to comply with the statute. In any event, the immunity granted under the subdivision protects the defendants even if the law officials were not properly notified. The requirement of giving notice to the officials is not a *sine qua non* to the grant of immunity. We agree with what was said in *Commission of Investigation* v. *Lombardozzi, supra,* 180 N.Y.S.2d at 503, where the court was construing an immunity statute substantially identical to the one *sub judice*:

> [fol. 318] "When requested in these proceedings, the Commission informed each appellant that it had afforded the Attorney-General and the appropriate district attorney an opportunity to be heard in compliance with section 7 but refused to specify the details thereof. We find no error in that decision. The grant of immunity was absolute. It appears to have been the legislative intent that before such extensive power was exercised by the Commission, as a matter of governmental comity, it should give certain public prosecutors an opportunity to be heard to enable them to induce the Commission to withhold the granting of such immunity for reasons advanced, which might have been unknown or overlooked by the Commission. But the opportunity to be heard was not a

> restriction on the power. If objections were made by prosecutors and not heeded by respondent, the witness would not be the less protected. Assuming the Commission acted improvidently in the face of objections it might be subject to correction in an official forum or otherwise. Such eventual correction, regardless of what effect it might have on the Commission, individually, or as a body, could not detract from the immunity already granted. Thus, in stating that the Attorney-General and appropriate District Attorney had been afforded an opportunity to be heard, the respondent sufficiently complied with the statute. It was not for appellants to go further into the matter. When the immunity is granted it is not at the peril of the witness but at the peril of the Commission if it fails to comply with the requirements of the statute."

We find no merit in the defendants' contention that not all of the law officials "having an official interest" in the proposed grant of immunity were notified in compliance with the immunity subdivision. The defendants do not suggest which other law officials should have been notified by the Commission. Moreover, what has been said in the preceding paragraph adequately answers this contention.

We further find no basis for the defendants' attack upon the validity of the appointment of the designees by the Commissioners to act in their places for the purpose of conferring immunity. *N.J.S.A.* 32:23-86(5) provides that immunity may be conferred by the Commissioners "or their designees appointed pursuant to the provisions of section 3 of article III of this act." In turn, this latter section [fol. 319] (*N.J.S.A.* 32:23-9) provides that though the Commissioners can act only by unanimous vote of both members, "Any member may, by written instrument filed in the office of the commission, designate any officer or employee of the commission to act in his place as a member whenever he shall be unable to attend a meeting of the commission." Pursuant to these provisions, Commissioners Thompson and Tyler designated William P. Sirignano and Myles J. Ambrose, respectively, to act in their places as members of the Commission in the present investigation on any occasion when the Commissioners were unable to attend, and to confer immunity upon the defendants. The defendants point out that the Commissioners' instruments of designation were executed on October 13, 1961, were unlimited as to time, and were actually put to use by the designees on October 27, 1961. They argue that a Commissioner as "a gubernatorially-appointed official [should not] be permitted to strip himself of what is probably his most solemn statutory function in this indiscriminate manner."

The short answer to this contention is that here there has been no such stripping of power by the Commissioners; the designation is clearly limited to a specific investigation, for a specific purpose, and may be exercised only on those occasions which the Commissioners themselves are unable to attend. There is nothing in the record to suggest that the Commissioners were free to attend the hearing on October 27, 1961.

We find no substance to the defendants' final challenge to the validity of the Commission's grant of immunity, *i.e.*, that the grant was not explicit as to each question on which the defendants' claims of privilege were overruled. The immunity subdivision provides: "In any investigation, . . . if a person refuses to answer a question . . . on the ground that he may be incriminated thereby, [fol. 320] and, notwithstanding such refusal, an order is made . . . [after due notice to appropriate officials and by the unanimous vote of both commissioners or their designees] that such person answer the question . . . , such person shall comply with the order. If such person complies with the order, and if, but for this subdivision, he would have been privileged to withhold the answers given . . . , then immunity shall be conferred upon him. . . ." It is clear from the above that the immunity is conferred by operation of the statute, and not by some ritualistic statement of the examining officer. In the proceedings before the Commission on October 27, 1961, the provisions of the immunity subdivision were read and explained to the defendants and their counsel. Each time a defendant refused to answer a question on the ground of self-incrimination, the Commissioners' designees unanimously ordered the defendant to answer that question notwithstanding his claim of the privilege. This procedure complied with the statute and was therefore sufficient to cloak the defendants with the statutory immunity.

The defendants next contend that they were denied due process of law by the Commission's refusal to adequately apprise them as to the "purpose and pertinency" of the investigation. The Supreme Court of the United States has made clear that a witness before an investigative body is entitled to be adequately apprised of the subject matter of the investigation, and of the manner in which the questions asked are pertinent thereto, in order that he may determine whether he would be within his rights in refusing to answer. *Scull* v. *Commonwealth of Virginia*, 359 U.S. 344, 3 L.ed.2d 865 (1959); *Watkins* v. *United States*, 354 U.S. 178, 1 L.ed.2d 1273 (1957); see *In re Application of Waterfront Com.*, 32 N.J. 323, 336-338 (1960).

[fol. 321] The defendants acknowledge that when they appeared before the Commission on October 3, 1961 and thereafter, they stood apprised that the purpose of the Commission's May 1960 investigation was to inquire into the work stoppage of May 16-20, 1960 on the American Export Lines' piers in Hoboken, in order to determine whether the work stoppage constituted a threat to the port-watchman security system by preventing Markley from functioning on the piers, and whether any violations of the Compact were involved. However, the defendants contend that their right to an adequate apprisal extends beyond the above recital of purpose. They urge that they are entitled to be "apprised" of any damaging information which the Commission might have against them, and to be confronted with any accusatory witnesses, in order that they might have "an opportunity to make a rational judgment of the necessity and advisability of invoking the self-incrimination privilege"; that they should not be placed "in the position of having to decide in the dark whether or not they should incur the grievous legal and social disadvantage of invoking the privilege of self-incrimination." The defendants cite no authority for this proposition, conceding it is "*de novo* in any jurisdiction." We think this point is wholly without substance. The defendants' argument assumes that the questions propounded called for an answer which might tend to incriminate them, and as to which, therefore, they might properly assert their privilege. Their contention, in effect, is that some incriminating questions might safely be answered if they knew beforehand that the Commission did not have enough other damaging information to make a future prosecution likely. In other words, they do not wish to be put in the position where they must make the distasteful choice of invoking the privilege unless they are certain it is necessary in order to protect themselves from a future prosecution.

[fol. 322] We know of no rule, constitutional or otherwise, which provides that when, as here, the subject matter of the inquiry and the pertinency thereto of questions have been made clear to a witness, he is entitled to be given further information before deciding whether to exercise his privilege against self-incrimination. If the Commission were thus compelled to disclose the contents of its files, then the whole investigative process would be subject to scrutiny before the investigation had even gotten under way, and in most cases the investigation would be thwarted. See *In re Application of Waterfront Com., supra,* 32 N.J. at 334. Investigations to determine whether there are evil conditions on the waterfront are too important to be shackled by recalcitrant witnesses, whose privileges against self-incrimination are amply protected, merely because of some asserted disadvantage which would seem at best to be of a nebulous nature. Due process of law does not require that the niceties of personal feelings be allowed to obstruct the search for truth. *Cf. In re Vince,* 2 N.J. 443, 457 (1949).

In connection with the defendants' contentions with regard to the Commissioners' appointment of designees, the adequacy of notice to the law officials of both States, and their demand for apprisal as to any damaging information or accusatory witnesses, the defendants moved before the trial court for discovery in the form of interrogatories and a bill of particulars. In view of our above disposition of these contentions, however, it follows that the defendants were not entitled to any further information regarding them. The defendants' discovery motions also sought information with regard to whether the Commission's present investigation was within its statutory jurisdiction. The defendants are foreclosed from raising that issue in these proceedings, however, since it was the sole subject of the defendants' first appeal to this court, wherein we held that [fol. 323] the Commission had jurisdiction to conduct the present investigation. *In re Application of Waterfront Comm. of N.Y. Harbor*, 35 N.J. 62 (1961). Therefore, the trial court was correct in denying the defendants' motions for discovery.

Nor was there error in the trial court's denial of the defendants' demand for a jury trial. Both *R.R.* 3:8-3, having to do with criminal contempts, and *R.R.* 4:87-3, having to do with contempts generally, upon which the defendants relied in their demand, specifically provide that "[t]he court in its discretion may try the issue without a jury." See *Green* v. *United States*, 356 U.S. 165, 2 L.ed.2d 672 (1958). We find that the trial court did not abuse its discretion in hearing the matter without a jury.

The defendants also contend that the commingling of the criminal and the civil contempt proceedings before the trial court was error, and that such error was compounded by the restrictive nature of the trial. We are satisfied that the defendants had a fair trial with regard to the issue of civil contempt, i.e., whether they should be incarcerated until they have answered the questions propounded by the Commission. The defendants do not dispute the facts that were presented to the trial court, and their contentions as to the legality of the proceedings before the Commission have already been disposed of in the course of this opinion. We therefore conclude that the trial court properly found the defendants guilty of civil contempt.

However, we think that the judgments holding the defendants guilty of criminal contempt must be reversed. In *N.J. Dept. of Health* v. *Roselle*, 34 N.J. 331, 344 (1961), we expressed grave doubts whether a defendant's rights could be adequately protected in a "double-barrelled proceeding," where charges of both civil and criminal contempt [fol. 324] are tried in a common hearing. Although the defendants did not specifically object to the dual aspects of the trial below, they did make known their desire to have an opportunity to introduce evidence on the question of intent to commit a criminal contempt. From our examination of the record, it appears that the defendants were exposed to criminal punishment without being afforded the opportunity to present evidence in their defense, if any, and in extenuation of the offenses charged and in mitigation of the penalties to be imposed. The trial court's refusal to hear any evidence, except for the limited purpose of pinpointing the areas of possible federal incrimination, denied the defendants the safeguards to which they were entitled as persons charged with criminal offenses. See *Cooke* v. *United States*, 267 U.S. 517, 537, 69 L.ed. 767, 774 (1924); *N.J. Dept. of Health* v. *Roselle*, *supra*, at 338-340.

For the reasons expressed above, the judgments of the Law Division insofar as they hold the defendants guilty of criminal contempt are reversed and the matters are remanded to the Law Division for new trials. The judgments of the Law Division are affirmed insofar as they order the defendants to be incarcerated until they make "responsive answers to the aforesaid questions [set out in the judgments] before the members of the Waterfront Commission of New York Harbor, or their designees . . . , as well as until such fine[s]" ($50.00 each) have been paid.

[fol. 325]

IN THE SUPREME COURT OF NEW JERSEY

Appeal Docket No. 3930

Civil Action on Appeal

In the Matter of the Application of the Waterfront Commission of New York Harbor, to punish John Moody, Sr. for failure to obey a Subpoena.

In the Matter of the Application of the Waterfront Commission of New York Harbor, to punish William Murphy for failure to obey a Subpoena.

MANDATE ON MODIFICATION—March 4, 1963

This cause having been duly argued before this Court by Mr. Harold Krieger, counsel for the appellants and Mr. Robert A. Pin and Mr. Irving Malchman, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgments of the said Superior Court—Law Division be and the same hereby are modified; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Superior Court—Law Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

Witness the Honorable Joseph Weintraub, Chief Justice, at Trenton on the fourth day of March, 1963.

John H. Gildea, Clerk of the Supreme Court.

[File endorsement omitted]

[fol. 326] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 327]

SUPREME COURT OF THE UNITED STATES

No. 138, October Term, 1963

WILLIAM MURPHY and JOHN MOODY, SR., Petitioners,

vs.

THE WATERFRONT COMMISSION OF NEW YORK HARBOR.

ORDER ALLOWING CERTIORARI—October 14, 1963

The petition herein for a writ of certiorari to the Supreme Court of the State of New Jersey is granted, and the case is set for oral argument immediately following No. 110. This case and case No. 110 are both placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 328]

SUPREME COURT OF THE UNITED STATES

No. 138, October Term, 1963

WILLIAM MURPHY and JOHN MOODY, SR., Petitioners,

vs.

THE WATERFRONT COMMISSION OF NEW YORK HARBOR.

ORDER—December 9, 1963

On Consideration of the motion of the respondent to require certification of additional parts of the record,

It Is Ordered by this Court that the said motion be, and the same is hereby, granted.

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MAY 17 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963

No. [redacted] 138

In the Matter of the Application
of
Waterfront Commission of New York Harbor, to punish William Murphy for failure to obey a Subpoena.

William Murphy,
Petitioner,

—v.—

The Waterfront Commission of New York Harbor,
Respondent.

In the Matter of the Application
of
Waterfront Commission of New York Harbor, to punish John Moody, Sr., for failure to obey a Subpoena.

John Moody, Sr.,
Petitioner,

—v.—

The Waterfront Commission of New York Harbor,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

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INDEX

PAGE

Citations to Opinion Below 2

Jurisdiction 2

Questions Presented 2

Statutes and Rules of Court Involved 7

Statement of the Case and of How the Federal Questions Are Presented 8

Reasons for Granting the Writ 19

CONCLUSION 27

AUTHORITIES CITED

Cases

Elkins v. United States, 364 U. S. 206 21

Feldman v. United States, 322 U. S. 487 (1943) 5, 20, 21

Hecht Company v. Bowles, 321 U. S. 321 (1944) 26
Hutcheson v. United States, 369 U. S. 599 20

Knapp v. Schweitzer, 357 U. S. 371 . . . . 4, 18, 19, 20, 21

Mapp v. Ohio, 367 U. S. 643 20
Mills v. Louisiana, 360 U. S. 230 20

Uphaus v. Wyman, 364 U. S. 388 26

Wolf v. Colorado, 338 U. S. 25 20

Federal Statutes

15 U.S.C.A. § 1 24
15 U.S.C.A. § 17 24
18 U.S.C.A. § 2 23

	PAGE
18 U.S.C.A. § 3	23
18 U.S.C.A. § 4	23
18 U.S.C.A. § 241	24, 25
18 U.S.C.A. § 371	23
18 U.S.C.A. § 641	25
18 U.S.C.A. § 659	23
18 U.S.C.A. §§ 661, 662	24
18 U.S.C.A. § 1951	23
28 U.S.C. § 1257(3)	2
Act of August 13, 1953, c. 407, 67 Stat. 541	7
Federal Management Labor Relations Act	24
Fourteenth Amendment	5, 6

New York Statutes

N. Y. Laws 1953, cc. 882, 883	7
New York Laws 1957, c. 188	7

New Jersey Statutes and Rules

L. 1956, c. 194	7
N. J. Stats. L. 1953; c. 202, pp. 1511 et seq.	7
N.J.S.A. 2A:84a-18, 19, 32	8
N.J.S.A. 32:23-1 et seq.	7, 10
N.J.S.A. 32:23-10, pars. 8, 11	7
N.J.S.A. 32:23-62	7
N.J.S.A. 32:23-70	7
N.J.S.A. 32:23-77	22
N.J.S.A. 32:23-85(4)	7
R.R. 4:46-5(c)	8

Miscellaneous

88 A.L.R. 2d 463	25
29 Fordham L. Rev. 421, Leach, "The Federal Government and Interstate Compacts"	22
McKinney's Unconsolidated Laws, §§ 6700aa et seq.	7

PAGE

Appendix A—Opinion of Supreme Court of New Jersey on Judgment Here Sought to be Reviewed 1a

Appendix B—Opinion of Superior Court of New Jersey, Law Division, Hudson County, on Judgment Here Sought to be Reviewed 36a

Appendix C—Opinion of Supreme Court of New Jersey in Prior Contempt Proceeding 65a

Appendix D—Opinion of Superior Court of New Jersey, Law Division, Hudson County, in Prior Contempt Proceedings 81a

Appendix E—Judgments Below 97a

Appendix F—Statutes and Rules of Court 109a

IN THE

Supreme Court of the United States

October Term, 1962

No.

In the Matter of the Application
of
Waterfront Commission of New York Harbor, to punish
William Murphy for failure to obey a Subpoena.

William Murphy,
Petitioner,

—v.—

The Waterfront Commission of New York Harbor,
Respondent.

In the Matter of the Application
of
Waterfront Commission of New York Harbor, to punish
John Moody, Sr., for failure to obey a Subpoena.

John Moody, Sr.,
Petitioner,

—v.—

The Waterfront Commission of New York Harbor,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

Petitioners, John Moody, Sr., and William Murphy pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New Jersey, entered in the above entitled case March 4, 1963.

Citations to Opinion Below

The opinion of the Supreme Court of the State of New Jersey, printed in Appendix "A" hereto, *infra,* is reported at 39 N. J. 436, 189 A. 2d 36. The oral decision or opinion of the Superior Court of New Jersey, Law Division, Hudson County, is unreported and is printed in Appendix "B" hereto, *infra;* it is also printed in the "Appendix to Appellants' Brief", pages 213a-236a, which was captioned below in the "Superior Court of New Jersey, Appellate Division", all available extra copies of said printed appendix being filed in this Court together with the instant petition. We also print in our Appendices hereto, *infra,* the following opinions, rendered in a companion or connected case involving the same parties and an earlier stage of the same proceedings and subject matter: (1) the opinion of the Supreme Court of New Jersey reported at 35 N. J. 62, 171 A. 2d 295 (Appendix "C", *infra*), (2) the oral opinion of the Superior Court of New Jersey, Law Division, Hudson County, rendered June 17, 1960, unreported (Appendix "D", *infra*).

Jurisdiction

The judgment of the Supreme Court of the State of New Jersey was entered March 4, 1963 (Appendix "E", *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), since the petitioners are claiming rights, privileges or immunities under the Constitution and under certain statutes (as recited *infra*) of the United States.

Questions Presented

The Waterfront Commission of New York Harbor, a bi-State agency established under an inter-state compact, subpoenaed the petitioners Moody and Murphy (Longshoremen's Union officials) to testify concerning a dock work stoppage which occurred in Hoboken, New Jersey in May, 1960, for the alleged purpose of getting rid of a crime-fighting chief security officer on the docks. The petitioners have been held in contempt, twice, for refusing to testify under these subpoenas. The second of those contempt cases gives rise to the instant petition for certiorari. The prior contempt case involved issues of N.L.R.B. preemption and adequate apprisal of the purpose or relevancy of the interrogation. After purging themselves of the prior contempt by invoking the privilege against self-incrimination, the petitioners were conferred immunity under ostensible statutory authority of the State of New Jersey (paralleling New York legislation for this bi-State agency). The immunity was expressly stated by the Waterfront Commission as not being intended to cover federal incrimination. Petitioners, still refusing to answer, were convicted in the Superior Court of New Jersey of both criminal and civil contempt, in a unified proceeding upon both the civil and criminal charges. These convictions were rendered after a "trial" in which the only factual issue tried was whether the petitioners have grounds for fearing federal incrimination. Even as to this latter issue the petitioners were denied, *in toto*, all relief by way of discovery, notwithstanding their detailed motions for discovery aimed at exploring the question of federal-state collaboration to incriminate petitioners as well as the question of whether the Waterfront Commission was really investigating "crime" or was still trying to obtrude itself into a federally pre-empted "N.L.R.B." area. The Supreme Court of New Jersey affirmed the judgments of civil contempt in all respects and it reversed the judgments of criminal contempt on the sole ground of the intermingling of the civil and criminal contempt proceedings. The Supreme Court of New Jersey did not reach the issue of petitioners' grounds for fearing Federal incrimination, because it held that the State-conferred immunity did not need to extend to Federal incrimination. For this same reason, and because it held the N.L.R.B. pre-emption issue not properly before it, the Supreme Court of New Jersey affirmed the denial of all of petitioners' requests for discovery. The Supreme Court of New Jersey also held that that State's general evidence statute defining self-incrimination to include Federal incrimination did not apply to Waterfront Commission investigations. The questions presented are:

1. Were the purported grants of immunity valid in view of the express exclusion of any grant of immunity against federal incrimination, where the situation in its nature so strongly bespoke the probability if not the virtual certainty of federal-state collaboration to fight alleged waterfront crime, and where petitioners' diligent and exhaustive requests for discovery and for trial testimony to elucidate such federal-state collaboration were denied? Do not these circumstances invalidate the purported grants of immunity simply on the basis of this Court's reservation, in *Knapp* v. *Schweizer*, 357 U. S. 371, as to proper cases which might arise in the future where the matter of federal-state collaboration in crime-enforcement should be present?

2. In any event, does not this case present a proper and indeed a compelling occasion for modification or abrogation of the primary ruling in *Knapp* v. *Schweitzer, supra*—approving a state grant of immunity even though federal

incrimination might result—via a decision which would overrule *Feldman* v. *United States*, 322 U. S. 487 (permitting use in a federal prosecution of evidence coerced through a state grant of immunity), which has been frequently criticized by several of the present Justices of this Court?

3. Were petitioners convicted of "civil contempt" in contravention of their 14th Amendment rights of due process and fair trial, in view of the following posture of the record:—The only factual matters "tried" were (1) the issue of petitioners' grounds for fearing Federal incrimination (which, however, the appellate court below treated as immaterial in view of its holding that the State-conferred immunity need not extend to Federal incrimination), and (2) the facts as to the actual happenings shown on the record of the interrogation before the Waterfront Commission (which were not disputed, i.e., that the petitioners were asked certain questions, refused to answer them, invoked the privilege against self-incrimination, were given immunity, still refused to answer, etc.). There was no trial, however, of the petitioners' claims that, in effect, they had no contemptuous intent and that their resistance to the Waterfront Commission's interrogation was grounded in good faith upon valid legal considerations. Those legal considerations included the following: (a) That petitioners were facing an accusatory and potentially punitive interrogation, entitling them to disclosure of the "case" against them and opportunity to defend; (b) That the failure and refusal of the Commission to afford to the petitioners the requested opportunity to make a rational judgment of the necessity and advisability of invoking the privilege of self-incrimination, which opportunity would have en-

tailed apprisal to the petitioners of the Commission's damaging information against them (if any) and confrontation and cross-examination of accusatory witnesses, worked a denial of due process of law in forcing the petitioners to exercise in the dark the onerous choice involved; and (c) that this failure and refusal of the Commission, and the concomitant denial of all the petitioners' requests for discovery, deprived petitioners of their fair constitutional opportunity to make a rational judgment as to whether the Commission's interrogation represented a bona fide inquiry into waterfront "crime" or whether, on the contrary, the Commission was merely still trying to intrude itself (as petitioners had claimed from the outset) into a federally pre-empted "N.L.R.B." area involving a "labor dispute".

4. Where "civil contempt" is for all practical purposes punitive and indeed indissoluble from "criminal contempt" charges in a single intermingled proceeding, are not the due process considerations in our question #3, above, fortified?

5. On the instant record, and in view of our questions #3 and #4, above, should not the Court consider in a full hearing on certiorari whether a new constitutional requirement of jury trial in "civil contempt" should be enunciated as a part of Fourteenth Amendment due process? (Not argued in this petition but preserved in event of granting of certiorari)

6. Is it a violation of Fourteenth Amendment equal protection to deny DISCRIMINATORILY to persons interrogated by the Waterfront Commission the benefit of the general New Jersey evidence statute which defines self-incrimination to include federal incrimination? (Not argued in this petition but preserved in event of granting of certiorari).

Statutes and Rules of Court Involved

The relevant statutory provisions and Rules of Court are printed in Appendix F, *infra*. The case involves portions of the New Jersey legislation relating to the Waterfront Commission of New York Harbor, a bi-state body established under an interstate compact (N. J. Stats. L. 1953, c. 202, pp. 1511 *et seq.*, as amended—see codification in N.J.S.A. 32:23-1 *et seq.*).* Specifically involved is the validity, as here construed and applied, of the New Jersey provisions conferring on the Commission powers to grant immunity to witnesses (N.J.S.A. 32:23-70). See also the New Jersey provisions conferring on the Commission subpoena powers and other investigative powers (N.J.S.A. 32:23-10, pars. 8, 11; N.J.S.A. 32:23-85(4)), and providing for punishment of witnesses, when duly subpoenaed to attend, for failure to produce other evidence before the Commission (N.J.S.A. 32:23-62). The immunity provision above referred to was not part of the original inter-state compact approved by Congress, but was enacted in 1956 in New Jersey (L. 1956, c. 194) and in 1957 in New York (New York Laws 1957, c. 188), as an agreement between the two States ostensibly supplementary to the Waterfront Commission compact and ostensibly amendatory thereof. This immunity legislation was ostensibly enacted pursuant to the provisions of Article XVI, section 1, of the Compact empowering the Legislature of either State, when concurred in by the Legislature of the other, to enact amendments and supplements to the Compact. N.J.S.A. 32:23-70.

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* The New York counterpart legislation is N. Y. Laws 1953, cc. 882, 883, as amended—see McKinney's Unconsolidated Laws, §§ 6700aa et seq. The consent of Congress to the compact was given by the Act of August 13, 1953, c. 407, 67 Stat. 541.

Other provisions of the Waterfront Commission legislation of New Jersey, and the New Jersey Rule of Court under which the Waterfront Commission instituted the within contempt proceedings (R.R. 4:46-5)(c)), are quoted in Appendix F, *infra*. The case also involves, subordinately, the so-called New Jersey Evidence Act of 1960, which, although it expressly states that "a matter will incriminate * * * if it constitutes an element of a crime against * * * the United States, or * * * is a circumstance which with other circumstances would be a basis for a reasonable inference of a commission of such a crime, or * * * is a clue to the discovery of a matter which is within [such categories of crime]", was construed in this case by the Court below not to be applicable to immunity proceedings conducted by the Waterfront Commission of New York Harbor. See N.J.S.A. 2A:84a-18, 19, 32 (printed in Appendix F, *infra*). The case also involves several federal statutes, cited and discussed *infra*, which petitioners claim give rise to reasonable fear of federal incrimination in the Commission's interrogation of petitioners.

Statement of the Case and of How the Federal Questions Are Presented

The controversy between the Waterfront Commission and these petitioners originated in the 1960 happenings previously referred to, which led to prior contempt citations against petitioners; and, as noted, petitioners have been purged of those prior contempts. The prior contempt proceedings arose as a result of refusals by petitioners in May, 1960, to answer certain questions in a hearing or investigative proceeding before the Commission. The instant contempt case arises from a similar situation in October, 1961, with one important difference, namely, that the petitioners' latest refusals to answer occurred after petitioners had invoked their privilege against self-incrimination and the Commission had purportedly conferred immunity upon them. The prior (1960) contempt proceedings—which involved primarily the issue of N.L.R.B. pre-emption—led to an appeal by the present petitioners to this Court, which was dismissed (368 U. S. 32—No. 362). We shall have occasion to refer, hereinafter, to our Jurisdictional Statement in said appeal to this Court, and we respectfully request the Court to refer to the copies of that Jurisdictional Statement which we assume still repose in the Court's files.

The prior contempt proceedings (1960) had also involved an issue of apprisal to the instant petitioners as to the purpose of the Waterfront Commission's interrogation. Petitioners had insisted, unavailingly, throughout those prior contempt proceedings (See our prior Jurisdictional Statement mentioned *supra*), that the record did not show an adequate due process apprisal to them of the Commission's contention that it was interested in investigating Waterfront "crime" as distinct from investigating a "labor dispute" within the pre-emptive jurisdiction of the N.L.R.B. We readily acknowledge that when the petitioners appeared before the Commission again for renewed interrogation, after the conclusion of the prior contempt proceedings (in which, again, petitioners were purged of said prior contempt), petitioners stood apprised of the general purpose of the Commission's interrogation. That is, although petitioners had not had such apprisal during the 1960 interrogation itself, they did learn from the subsequent court proceedings in the contempt case stemming therefrom that the Commission conceived the 1960 work stoppage as possibly being an impairment of the port-watchman system (in the person of a man named Markley), which is to say that the Commission conceived itself to be engaged in an investigation of possible waterfront crime or of efforts to combat the Commission's program of fighting such waterfront crime.

Nevertheless, the apprisal issue became acute in a new form when the Commission renewed its efforts (October 3, 1961) because it was now explicit on the record that the Commission aimed at implicating the petitioners in some kind of criminal activity, i.e., the petitioners were now facing an out-and-out accusatory procedure, in which, furthermore, it was realized by everyone that the Commission's statutory power to confer immunity was probably going to be invoked to strip the petitioners of the protection of the privilege against self-incrimination. The very reason of the Commission's existence, namely the fighting of waterfront crime, formed the motive of this renewed interrogation, according to the Commission's own insistent assertions (D3a to D7a).* The AT LEAST OSTENSIBLY [redacted] accusatory nature of the interrogation, therefore, could no longer be doubted. The Commission's statutory powers, moreover, include a fearsome array of punitive weapons (N.J.S.A. 32:23-1 *et seq.*). Thus, the petitioners were facing not merely an *accusatory* proceeding, but also a potentially *punitive* one at the hands of the Commission itself. The petitioners were not merely being "investigated", then, but were also being "tried", in view of the peculiar combination of powers that are vested in this Commission. These circumstances alone, without more, would have caused the petitioners to insist upon adequate apprisal of any damaging information that the Commission possessed concerning them, and the right to be confronted with the accusatory witnesses and to cross-examine those witnesses.

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* These references are to our printed appendix in the court below (extra copies filed herewith).

However, there was still a further reason why the petitioners felt so entitled. In view of the over-hanging threat of the Commission's immunity powers, and in view also of the fact that it is always a serious disadvantage to a person to be put in the position where he may have to exercise his privilege against self-incrimination, the petitioners considered that they were entitled to full apprisal of the Commission's "case" against them before they should have to make the painful choice of invoking the privilege. For all of the above reasons, the petitioners, at the proceedings before the Commission on October 3, 1961, and in the subsequent proceedings before the Commission (see below), asserted in a systematic manner at every appropriate stage their requests for apprisal along the lines above mentioned.

The pertinent parts of the transcripts of the Commission's proceedings of October 3, 1961 were before the courts below as Exhibits in support of the Commission's motions for contempt (Exh. E—Murphy; Exh. F—Moody; D17a; D35a).

These transcripts are in all essential respects a virtual re-play of the Commission's style of interrogation of the petitioners in the May, 1960 proceedings. That is, once again in these October 3, 1961 proceedings the Commission flatly declined to disclose any damaging information which it might possess concerning petitioners, and it merely informed them that it was interested in finding out the purpose of the alleged opposition to port watchman Markley. Every effort by the petitioners to ascertain the purpose and pertinency of the interrogation to any degree beyond the utterly general "apprisal" just described, was rejected, including requests by the petitioners for production of any order by the Commission directing the investigation to be held, and including also requests that the Commissioners themselves (or any other persons having knowledge of the matter) appear as witnesses in the Commission's proceedings (D18a to D37a; D39a to D52a).

Furthermore, and of utmost importance, the petitioners unavailingly urged at the October 3, 1961 proceedings our above-described position that the Commission was prejudicing the petitioners' rights of due process in putting them to the onerous choice of invoking the privilege against self-incrimination before giving them sufficient apprisal of the accusatory facts to enable them to make such choice on a rational basis.*

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* The following is one of the several statements of the petitioners' position before the Commission on October 3, 1961 (D41a):

> "Mr. Krieger: * * * I object * * * in that * * * there is a failure to state the purpose of this investigation, the pertinency of this question and further, * * * now I ask you for the purpose and pertinency of the statement, detail the specific charges that may concern this individual, also the names of any witnesses to support such charges and a confrontation with such witnesses. I make these requests on the grounds of due process of law and the right of a fair hearing and examination. I am pointing out that the Commission is an accusatory agency expressly claiming that its function is to deal with commissions

The Commission's representatives at the October 3, 1961 proceedings overruled all of the petitioners' objections except the privilege against self-incrimination. Except for answering questions about their identity and the title of their offices in the Union, both petitioners refused to answer all questions, invoking the privilege against self-incrimination (which they did under the protest above noted based on denial of due process of law) (D18a to D52a). The Commission's representatives thereupon announced that the proceedings would be adjourned pending a determination by the Commission as to whether to invoke the immunity provisions of the Compact (D36a; D52a). In the interim petitioners were purged of the prior contempt because they had invoked the privilege against self-incrimination (D55a).

On October 27, 1961, the petitioners were again required to appear before the Commission's representatives, for the purpose of having conferred upon them the dubious boon

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of crime by individuals. This makes the Commission a combination of a Grand Jury and a punitive tribunal. And if the purpose and pertinency and all the other full apprisals above described have not been made, then Moody is forced under these circumstances to make a choice on whether or not to invoke privileges guaranteed by the Constitution, and * * * in a setting that denies him due process of law. That being so, there are serious disadvantages that he is placed in both legal and social, which attach to a person who is compelled to invoke the privilege of self incrimination. It constitutes a denial of due process of law to force this man to choose to invoke, at such a disadvantage the privilege of self incrimination. The Waterfront Commission, by refusing to give us full apprisal from which we would be able to determine rationally whether we need to invoke self incrimination, is forcing us to invoke the privilege in the dark, and is forcing us to incur the disadvantages above-mentioned in the dark, * * * without due process of law. And, therefore, under the circumstances this witness must invoke the privilege of self incrimination under protest. * * *"

of "immunity". The transcripts of the Commission's proceedings of October 27, 1961 were before the Courts below in the instant contempt proceedings as Exhibits annexed to the Commission's motions for contempt (Exh. I—Murphy; Exh. J—Moody; D57a; D92a).

In the October 27, 1961 proceedings, once again, the purpose of the proceedings was stated by the Commission's representatives in the now familiar terms of mere generality ("to inquire into violations of the Compact in connection with a work stoppage in May 1960", etc.). The petitioners reiterated their prior demands for a fuller statement of the purpose and pertinency of the interrogation, including requests for any relevant order of the Commission that might show a determination by the Commission as to purpose or pertinency. The petitioners also pointed out that there has never yet been in this case any explicit judicial determination as to the issues of adequate apprisal. All such objections and requests by the petitioners were rejected. The only statement vouchsafed by the Commission's representatives in support of their announced intention to invoke their alleged immunity powers was a bare recital of the procedural history of this case (D57a to D111a).

Before the petitioners took the stand at the Commission's proceedings on October 27, 1961, the objections of due process which they developed in the proceedings of October 3, 1961—see, *e.g.*, our last preceding footnote, *supra*—were restated for the record (D61a; D94a). These objections were likewise re-stated at appropriate times during the course of the questioning of the petitioners on October 27, 1961 (D57a *et seq.*).

Most especially, the petitioners on October 27, 1961 objected to the purported grant of immunity on the ground that the immunity did not extend to federal incrimination; the Commission's representatives stated that the grant of immunity did not so extend to federal incrimination (D74a to D76a; D93a to D94a).

The questioning of the witnesses (the petitioners) on October 27, 1961 followed the pattern of the witnesses' invoking the privilege against self-incrimination under all the objections, reservations and protests earlier described in connection with the proceedings of October 3, 1961; the Commission's representatives either directing each witness to answer the questions notwithstanding his claim of privilege, or directing him so to answer on the express ground that he was being granted immunity (D71a to D91a; D93a to D103a).

The petitioners also invoked, in the proceedings of October 27, 1961, all of the grounds asserted in their Jurisdictional Statement filed with this Court in their attempt to obtain review of the prior contempt judgments (D100a). This brought back into the case, we submit, the issue of N.L.R.B. preemption (as fully argued in our aforesaid Jurisdictional Statement).

At the conclusion of the proceedings of October 27, 1961, the Commission's representatives directed their attorney to proceed against the petitioners for contempt (D91a; D103a).

The Commission's motions to punish petitioners for contempt (D3a *et seq.*) (after the above-described supposed grants of "immunity"), recited once again the Commission's official purposes as an organization created "to eliminate evil conditions and criminal and corrupt practices in the port of New York District" (D3a; see also D3a to D7a), recounted in detail the history of the prior contempt proceedings (D6a to D9a), set forth the statutory provisions relating to the Commission's power to grant immunity (D10a to D11a), recited the interrogational proceedings of October 3, and 27, 1961 (D9a to D13a), and requested that petitioners be punished as for both a civil and a criminal contempt of court (D14a to D15a)—the 1960 contempt having been solely *civil* (D27a). Annexed to the motions were the various exhibits, to which reference has been made, depicting the prior history of this matter (D16a to D111a).

The petitioners filed an answer to the Commission's motions denying all the allegations, and raising separate defenses, *inter alia,* of failure to grant immunity against federal incrimination, denial of due process of law, preemption of the subject matter of the inquiry by the Federal Management Labor Relations Act, and inadequate apprisal of purpose and pertinency (D112a to D114a). Petitioners also moved for a bill of particulars (D115a), and for an order requiring answers to interrogatories.* Petitioners also requested a jury trial (D120a).

In describing the next step in this matter—the "trial" of the instant contempt proceedings following the conferral of "immunity"—we come to a striking feature of the case. Notwithstanding that the motions for contempt expressly sought conviction both for criminal and civil contempt, and notwithstanding that the proceedings were not in the remotest way based upon conduct of the petitioners that could conceivably bring into play any "summary" power to punish for contempt, the trial court announced at the "trial" of the contempt motions that no witnesses would be heard and no testimony would be taken—which meant that the petitioners would be "tried" on what amounted to criminal charges based solely on the Commission's moving papers, the petitioners not even having the benefit of affidavits on their own behalf because they had entered a general denial *per* their formal answer to the contempt motions in the unquestioning assumption that they were going to have a "trial" at which testimony would be introduced. See, *e.g.,* D157a to D158a, D182a.

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* The interrogatories sought information identical with that sought by the bill of particulars and are not printed in Appellants' Appendix in the court below.

Testimony by the petitioners on the issue of their cause to fear federal incrimination (D184a to D209a) was the only evidence taken at the "trial" below, notwithstanding repeated requests by the defense (*e.g.,* D179a; D182a). See also D236a.

All of the petitioners' defenses of law and fact raised by their answer to the contempt motions were rejected by the trial court. Petitioners' motions for discovery were denied. Their request for jury trial was denied. D213a to D236a; D250a to D257a.

The trial court ruled that the Commission's grant of immunity was valid. Both petitioners were adjudged guilty of both civil and criminal contempt and were sentenced to fine and imprisonment (D250a to D257a).

In the appeal from the contempt convictions in the court below—the Supreme Court of New Jersey, which had directly certified the appeal from the Appellate Division of the Superior Court—the judgments of conviction of criminal contempt were reversed and remanded on the ground of the intermingling of the civil and criminal proceedings, but the judgments of civil contempt were affirmed. The Court below ruled, in effect, that by virtue of decisions of this Court, notably *Knapp* v. *Schweitzer, supra,* there is no constitutional requirement that State-conferred immunity shall protect against Federal incrimination; and it held that the New Jersey Evidence Act of 1960 (*supra*), which defines the New Jersey privilege against self-incrimination as embracing matters of federal incrimination, is not applicable to the bi-state legislation relating to the Waterfront Commission. The Court below also held that the petitioners' contentions addressed to the issue of N.L.R.B. pre-emption were not properly presented for decision because, the Court said, those matters had been litigated and disposed of in the prior contempt proceedings. The Court below also held that petitioners' contention that they should not have been required to make the onerous choice as to invoking their privilege against self-incrimination in the dark, as it were, was without substance. As we understand the decision of the Court below, it was seemingly on the basis of the rulings just described that the Court also ruled that all of petitioners' requests for discovery, including those addressed to the issue of Federal-State collaboration to incriminate petitioners and to the issue of the bona fides of the Waterfront Commission's assertions that its investigation was aimed at waterfront crime rather than a "labor dispute", had been properly denied by the trial court. Also, since the Court below took the view that a State conferral of immunity is not constitutionally required to extend to Federal incrimination, that Court declared that it deemed it unnecessary to determine whether the petitioners herein had grounds to fear federal incrimination. The Court below deemed the Waterfront Commission's needs to pursue criminals (including apparently even "federal" criminals) so paramount that it said (Appendix A, *infra*, pp. 23a-24a):

> "If, as defendants contend, a witness may claim the privilege against self-incrimination with respect to federal crimes notwithstanding a conferral of bi-state immunity by the Commission, it would follow that there could be no effective investigation not only of the state aspects of such crimes but even of the non-criminal aspects of waterfront conditions *since possible federal criminal overtones are frequently present*. This is so because of the nature of waterfront activity *and its constant involvement with interstate commerce and other such areas of federal jurisdiction*. Since the Commission cannot grant immunity as to the federal crimes it will remain helpless. The difficulty is not merely fanciful; it might well result that investigations by the Commission would be seriously hampered and, in many cases, frustrated." (Emphasis supplied)

Reasons for Granting the Writ

1. The question of the relationship between state-conferred immunity and federal incrimination—a question which is usually said to have been set at rest against any theory of state immunization of federal incrimination—does not seem permanently foreclosed in the light of the most recent decisions of this Court. It is true that in *Knapp* v. *Schweitzer*, 357 U. S. 371 (1958), a state grant of immunity was approved even though federal incrimination might

result—although, the Court did reserve the case of an actual federal-state cooperative effort at incrimination. Four of the Justices in the *Knapp* case pointed out that the rule of that case would cease to have even ostensible doctrinal validity if the case of *Feldman* v. *United States*, 322 U. S. 487 (1943) (permitting use in a federal prosecution of evidence coerced through a state grant of immunity) were to be overruled. The same four Justices (Chief Justice Warren, and Justices Brennan, Douglas and Black) noted the problem of the *Feldman* case again in *Mills* v. *Louisiana*, 360 U. S. 230 (see especially, Justice Douglas' dissent in the *Mills* case for a summary of the dilemma created by the *Feldman* case, whereby, Justice Douglas argued, it had now become imperative to require state-conferred immunity to bar federal incrimination).

Again, in *Hutcheson* v. *United States*, 369 U. S. 599, the three Justices (Chief Justice Warren and Justices Brennan and Douglas) who did not join in the three-Justice opinion of the Court, urged the question of reconsideration of the *Feldman* decision, *supra*.

All of this takes on an even more urgent interest in view of *Mapp* v. *Ohio*, 367 U. S. 643, where the Court decided for the first time that the Fourth and Fourteenth Amendments of the United States Constitution require the exclusion from State criminal prosecutions of evidence obtained by unreasonable search-and-seizure, overruling *Wolf* v. *Colorado*, 338 U. S. 25. At its preceding Term, the Court had outlawed the "Silver platter" doctrine under which articles obtained as a result of unreasonable search-and-seizure by state officers, without involvement of federal officers, had long been permitted to be introduced in evidence against defendants in federal criminal trials. *Elkins* v. *United States,* 364 U. S. 206. The bearing of these search-and-seizure developments on the issue of state-federal immunity is that the *Feldman* case, *supra* (permitting use in a federal criminal trial of evidence coerced by a state grant of immunity), had relied strongly if not dispositively on the analogy of the then-still-intact "Silver platter" doctrine, which was thrown out in *Elkins, supra,* and which was reciprocally fortified in its demise, as it were, by *Mapp* v. *Ohio, supra.* It, therefore, appears that the situation may well be ripe for an abandonment of the rule of the *Feldman* case, which in turn, would seem to foredoom the rule of cases like *Knapp* v. *Schweitzer, supra.* In this highly mobile condition of the operative judicial doctrines pertaining to our subject, it is timely for this Court, we respectfully submit, to declare, for the purposes of the present case, that the failure of the Commission to immunize the petitioners against federal incrimination invalidates the purported grants of immunity as a matter of federal constitutional law.

2. In any event, there is the reservation which this Court expressly made in *Knapp* v. *Schweitzer* for future situations of "collaboration between state and federal officers", wherein "the defendant could successfully assert his privilege in the state proceedings" (357 U. S. at 380); we respectfully urge that the record in the present case brings into play that reservation. We take this position because, as noted in our Statement of the Case, *supra,* we expressly (but unavailingly) sought in the proceedings below exhaustive discovery and the introduction of evidence at the contempt trial with the express view of developing this

matter of federal-state collaboration. We urge this position, also, because of the "semi-federal" (if we may so term it) character of the Waterfront Commission of New York Harbor, a bi-state agency created by federally approved Compact and designed (so the Commission never tires of asserting) to combat waterfront crime in interstate and foreign commerce. The Commission must necessarily deal with interstate and foreign commerce. It is common for interstate agencies to have direct relations with federal departments. 29 *Fordham L. Rev.* 421, 431, Leach, "*The Federal Government and Interstate Compacts.*" Indeed, the compact in question provides for direct relations in areas where federal funds are sought by the Commission. *N.J.S.A.* 32:23-77.

Although the Court below deemed it unnecessary to reach the question, we consider it proper to point out that, upon the Commission's own assertions in its various papers throughout this litigation, petitioners Murphy and Moody do indeed face exceedingly dire prospects of federal incrimination. Throughout this litigation, the Commission has been trumpeting the suspicion that Murphy and Moody have some guilty knowledge of or involvement in an unlawful concert by union longshoremen aimed at removing from the waterfront scene a reputedly diligent and honest port watchman or port security officer (Markley), the obvious imputation being that Murphy and Moody are in some way guiltily involved in an attempt to make it possible for thieves to steal property on the waterfront.

From this, it at once becomes evident that, if the Commission's imputations are to be credited, coerced testimony by Murphy and Moody on the subject matter in question would put them in direct peril of incrimination arising under 18 U.S.C.A. § 659, and statutes adjective thereto. Said § 659 makes it a federal crime to embezzle, steal, etc. from any "railroad car, wagon, motor truck, or other vehicle, or from any station, station house, platform or depot, or from any steamboat, vehicle or *wharf* * * * any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express". Said § 659 contains additional detailed provisions, too lengthy to be quoted, which would place Murphy and Moody in peril of prosecution on the basis of the Commission's imputations. Our reference above to provisions which we termed "adjective" to § 659 has in view the federal criminal provisions against conspiracy to commit any federal offense (18 U.S.C.A. § 371), against aiding and abetting in the commission of any such offense (18 U.S.C.A. § 2), against acting as an accessory after the fact in regard to any such offense (18 U.S.C.A. § 3), and against misprision of federal felonies (18 U.S.C.A. § 4). Thus, under the theory of the Commission's own imputions in this case, Murphy and Moody would have reasonable cause to fear federal prosecution for conspiracy to assist in making it possible for thefts to be perpetrated at the Hoboken pier here involved, for conspiracy to effect misprision of the thieves, for aiding and abetting in such theft or in such conspiracy, and for acting as accessories after the fact in such thefts or conspiracy—not to say Internal Revenue offenses.

Similar reasonable cause to apprehend federal incrimination arises under the following additional federal statutes: (1) 18 U.S.C.A. §1951 (the so-called anti-racketeering statute punishing the offense of interference with commerce by threats or violence—"whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do", etc.); (2) "conspiracy" or "combination" "in restraint of trade or commerce" under 15 U.S.C.A. § 1, *i.e.*, violation of the federal anti-trust law (it is to be noted that 15 U.S.C.A.. §17, exempting labor unions from certain aspects of the anti-trust laws, would not be a bar to federal prosecution in the circumstances connoted by the Waterfront Commission's imputations herein); (3) criminal prosecution for violation of the federal civil rights law, 18 U.S.C.A. § 241, in that the alleged attempt by Murphy and Moody to force Markley off the docks would come within the statutory language "if two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the * * * *laws* of the United States", Markley's rights under the Federal Management Labor Relations Act being protectible under said civil rights statute, as shown below; (4) furthermore, on the quite possible theory that the alleged thefts at the waterfront might involve situations arising under the "special maritime and territorial jurisdiction" of the United States, Murphy and Moody face the danger of federal incrimination (under the Commission's imputations) pursuant to 18 U.S.C.A. sections 661 and 662, pertaining to thefts within said special federal jurisdiction (the above mentioned conspiracy, aiding and abetting, misprision, etc. provisions being pertinent hereto also); (5) also, should the alleged waterfront thefts involve any "things of value of the United States, or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof", similar federal incrimination could arise under 18 U.S.C.A. section 641 and the "adjective" statutes above mentioned.

Further as concerns the possibility of a federal civil rights prosecution above mentioned, we respectfully refer the Court to pages 18 to 20 of our printed Jurisdictional Statement which we filed in this Court in the prior stage of this matter; see footnote 9 at said pages 18-20, where we spell out in detail the ways in which Markley's rights under the Labor-Management Relations Act could be operative in this case. Any asserted violation of those federally protected rights of Markley by Murphy and Moody could be federally incriminatory as a denial to Markley of rights given to him by "federal law" within the meaning of 18 U.S.C.A. section 241, the civil rights penal provision above discussed.

See also 88 A.L.R. 2d 463.

Finally, we call attention to the following item in connection with the Commission's interrogation of Murphy and Moody in the "immunity"-conferral proceedings in this case, which serve to underscore the reality and the rationality of the petitioners' fear of Federal incrimination if they should answer the Commission's question: Not content with asking the petitioners about the port-security (i.e., imputedly "criminal") aspects of the *May 1960* longshoremen's walkout, the Commission *on October 27, 1961* demanded that the petitioners answer questions about their *then* knowledge and intentions concerning this port-security feature which was allegedly entailed in the alleged opposition to the presence of port-watchman Markley; by this questioning, we submit, the Commission manifested to the petitioners that it was imputing to them a *continuing* complicity in alleged violations of federal criminal statutes (D89a, D90a).

3. In connection with our "Questions Presented" herein Nos. 3, 4 and 5, *supra,* we are in effect bringing forward three issues that we realize are novel, namely, the jury-trial issue mentioned in our Question No. 5, *supra,* and: (1) That investigative or other inquisitional bodies should not be permitted, as a matter of due process of law, to put citizens in a position of having to decide in the dark whether or not they should incur the grievous legal and social disadvantage of invoking the privilege against self-incrimination; this point seems to us especially compelling where, as in the case at bar, the setting of the inquisition is not merely investigative but also accusatory and punitive. (2) That in civil contempt no less than in criminal contempt due process requires a trial of the issue of defendant's "intent" or non-contemptuous good faith. So far as we can discover, nowhere in this Court's numerous decisions on the law of contempt is there any suggestion that, as a general proposition, due process functions any differently in a contempt trial depending upon whether it is "civil" or "criminal"; and see Mr. Justice Douglas' dissent (joined by the Chief Justice and Mr. Justice Black) in *Uphaus* v. *Wyman,* 364 U. S. 388, 404. Petitioners herein were denied absolutely any trial of the issue of their good faith in regard to the alleged civil contempt,* and they were refused discovery

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* Cf. the Court's emphasis upon similar "good faith" defenses in *Hecht Company* v. *Bowles,* 321 U. S. 321 (1944).

for the purpose of this defense—i.e., discovery aimed at eliciting whether the Commission was genuinely concerned about petitioners' supposed role of fostering crime on the waterfront, or whether the Commission was attacking legitimate labor union interests which petitioners as union officials felt compelled to protect.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

Harold Krieger
Attorney for Petitioners

[Appendices Follow]

APPENDIX A

Opinion of Supreme Court of New Jersey on Judgment Here Sought to be Reviewed

SUPREME COURT OF NEW JERSEY
A-53 September Term 1962

In the Matter
of

The Application of the Waterfront Commission of New York Harbor, to punish John Moody, Sr. for failure to obey a Subpoena.

In the Matter
of

The Application of the Waterfront Commission of New York Harbor, to punish William Murphy for failure to obey a Subpoena.

Argued Decided

Mr. Harold Krieger argued the cause for the Defendants-Appellants, John Moody, Sr. and William Murphy. (Messrs. Krieger & Chodash, Attorneys; Mr. Robert Wall, of counsel, and Mr. Harold Krieger on the brief.)

Mr. Robert A. Pin and Mr. Irving Malchman argued the cause for the Waterfront Commission of New York Harbor. (Mr. William P. Sirignano and Mr. Irving Malchman (both of the New York Bar) on the brief.)

The opinion of the court was delivered by
PROCTOR, J.

This is a consolidated appeal from two judgments of the Superior Court, Law Division, adjudging each of the defendants, John Moody, Sr., and William Murphy, guilty of civil and criminal contempt for failing to testifying pursuant to subpoenas issued by the Waterfront Commission of New York Harbor (Commission). The judgments fined the defendants $50.00 each and sentenced them to 30 days in jail. The judgments further ordered that the subpoenas be obeyed by the giving of responsive answers before the Commission to the questions set forth therein, and that the defendants be incarcerated until they answer those questions. The judgments also provided for a stay of execution pending appeal, the defendants having previously posted bonds.

We certified the defendants' appeal before argument in the Appellate Division.

This is the second time that the defendants have been adjudged in civil contempt for their refusal to testify pursuant to the aforementioned subpoenas. Briefly, the history of this litigation is as follows: One James H. Markley was an investigator for the Commission, assigned principally to cover the piers of the American Export Lines in Hoboken, New Jersey. On or before May 16, 1960, Markley left the employ of the Commission in order to work for the American Export Lines as a security officer, and obtained a license from the Commission to operate as a port watchman. On Monday, May 16, 1960, the day Markley commenced work for the American Export Lines on its Hoboken piers, the longshoremen employed by American Export Lines on those piers did not report for work. This work stoppage, except for the morning of Tuesday, May 17, continued through Friday, May 20, 1960. The striking employees were members of Hoboken Local No. 2 of the International Longshoremen's Association (ILA). The defendant Moody is an organizer of the ILA in New Jersey, and the defendant Murphy is the business agent of Local No. 2.

Under our Waterfront Commission Act, N.J.S.A. 32:23-1 *et seq.*, (the New York counterpart is New York Laws 1953, c. 882, c. 883), the longshoremen who participated in this work stoppage are required to be and are registered with the Commission. N.J.S.A. 32:23-27. Also, under the Act, Markley, as a security officer of American Export Lines, is required to be licensed as a port watchman. N.J.S.A. 32:23-39.

The Commission had information that the work stoppage was "a concerted effort to keep James H. Markley off the piers of the American Export Lines." Accordingly, the Commission instituted an investigation to determine whether any persons registered with or licensed by the Commission were violating the Waterfront Commission Act by coercing an employer to limit the functions of, or to discharge, a licensed port watchman. In connection with its investigation, the Commission duly served the defendants with subpoenas on May 18, 1960, ordering them to appear and testify at the Commission's offices in New York City. The defendants appeared at the offices of the Commission in response to the subpoenas on May 19, 1960. At the hearing, Moody, after giving his name and address and testifying that he was a union official, refused to answer any further questions. Murphy testified that he was a business agent of Local No. 2 and represented members of the local working at the Hoboken piers of the American Export Lines. He said he knew that the longshoremen did not work on May 16, 1960, and that it was common knowledge that for some time before that day things were not normal at the American Export Lines. However, he refused to say whether those conditions were related to the employment of Markley as a port watchman, and he refused to answer any other questions. Both defendants expressly declined to assert their privilege against self-incrimination, although they were specifically asked if that was one of the grounds for their refusal to testify. The primary reason for their refusal to testify was their assertion that the Commission had no statutory authority to investigate the work stoppage because it involved a labor dispute over which the National Labor Relations Board had exclusive jurisdiction.[1]

Thereafter, the Commission instituted contempt proceedings against the defendants in the Superior Court, Law Division, which resulted in judgments dated June 20, 1960, holding the defendants guilty of civil contempt and ordering that they be fined $50.00 each and that they be incarcerated until they obeyed the Commission's subpoenas. These judgments were affirmed by this court, and the United

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[1] On defendants' appeal from the first judgment holding them in contempt (*In re Application of Waterfront Comm. of N. Y. Harbor,* 35 N. J. 62 (1961)), defendants' other stated reasons for their refusal to answer were not urged as a ground for reversal.

States Supreme Court dismissed the defendants' further appeal and also denied *certiorari. In re Application of Waterfront Comm. of N. Y. Harbor*, 35 N. J. 62 (1961), *appeal dism'd and cert. den. sub nom. Murphy* v. *Waterfront Commission of New York Harbor*, 368 U. S. 32, 7 L. ed. 2d 91 (1961).

Pursuant to the mandate of this court in the above contempt proceedings, the defendants appeared before the Superior Court, Law Division, on October 3, 1961. The court directed the defendants to appear before the Commission pursuant to the May 1960 subpoenas. Later that day, the defendants appeared at the offices of the Commission as directed. However, except to give their names, addresses and occupations, the defendants again refused to answer any questions, this time upon a number of new objections including the privilege against self-incrimination. All of the objections were overruled by the Commission except the assertion of the privilege against self-incrimination. The hearing was then adjourned and the subpoenas were continued until October 10, 1961, so that the Commission could decide whether to grant the defendants immunity from prosecution pursuant to N.J.S.A. 32:23-86(5) of the Waterfront Commission Act, and if so, to afford the Commission an opportunity to give notice to the appropriate officials as required by that subdivision.

On the following day (October 4, 1961) the defendants and the Commission's representative appeared before the Law Division. The court found that the defendants had obeyed the subpoenas, and that their assertion of the privilege against self-incrimination had been recognized by the Commission as a valid basis for their refusal to answer the Commission's questions. The court held that, since the defendants had complied with the judgments of the court entered June 20, 1960, they had purged themselves of contempt. However, the court also directed that the defendants should continue to be subject to the subpoenas, and that the defendants appear before the Commission on the adjourned return date (October 10, 1961).

The return date of the subpoenas was further adjourned with the consent of the parties until October 27, 1961, at which time the defendants appeared at the offices of the Commission. At the outset of this meeting, Myles J. Ambrose, Executive Director of the Commission, announced, "The purpose of the meeting is to inquire into violations of the Compact in connection with a work stoppage in May, 1960, at the American Export Line piers in Hoboken, New Jersey."

The following documents were made part of the record: (1) letters (pursuant to N.J.S.A. 32:23-9) from the Commissioners designating Ambrose and William P. Sirignano, the Commission's General Counsel, to act in the places of Commissioners Harold R. Tyler, Jr., and David C. Thompson in the investigation wherein Murphy and Moody were subpoenaed, and to confer immunity upon them pursuant to N.J.S.A. 32:23-86(5); (2) copies of letters sent pursuant to N.J.S.A. 32:23-86(5) to the Attorneys-General of New York and New Jersey, to the District Attorney of New York County and to the Prosecutor of Hudson County, together with certificates of mailing, notifying them of the Commission's intention to confer immunity upon Murphy and Moody; and (3) letters of reply received from all of the above-named officials except the Prosecutor of Hudson

County, stating that each had no objection to the Commission's proposed grant of immunity to the defendants. No reply was received from the Prosecutor of Hudson County.

Counsel for the defendants objected to the legality of the proceedings on the ground that the Commissioners could not delegate the power to grant immunity to their designees, Ambrose and Sirignano. They also challenged the adequacy of the letters of notice sent to the officials of the two States. They further demanded a statement apprising them of the purpose and pertinency of the interrogation, contending that the Commission's failure to give them such a statement deprived them of due process of law. All these objections and demands were rejected.

Thereafter, the defendants each took the stand and, after stating his name and address, each refused to answer any further questions on the ground that his answers might tend to incriminate him. Thereupon the Commissioners' designees granted immunity to each of the defendants pursuant to N.J.S.A. 32:23-86(5) against prosecution in the States of New York and New Jersey concerning any transaction to which they would testify, and directed the defendants to answer each of the questions. All of the questions pertained to the defendants' knowledge or actions in connection with the May 1960 work stoppage. The defendants again refused to answer for all of the reasons stated above, and particularly because the grant of immunity did not protect them against federal prosecution.

The Commissioners' designees expressly recognized that the grant of immunity did not extend to federal prosecution, but nevertheless directed the defendants to answer, saying that there was no requirement that the immunity extend that far. Upon the defendants' further refusal to answer, the Commissioners' designees directed the attorney for the Commission to institute contempt proceedings against the defendants.

The Commission initiated the present proceedings by moving before the Law Division that the defendants "be punished as for a civil and criminal contempt of court." Annexed to the moving papers were numerous exhibits depicting the prior history of the matter and including transcripts of the proceedings before the Commission on October 3, 1961, and October 27, 1961. In response to the Commission's motions, the court issued orders on November 1, 1961, directing the defendants to show cause why they should not be punished as for a contempt of court. The defendants filed an answer to the Commission's motions in which they denied all the allegations, and raised the following separate defenses: (1) failure of the Commission to grant immunity against federal incrimination; (2) improper delegation by the Commission of the power to confer immunity; (3) insufficient notice to the officials of the respective States; (4) failure to explicitly confer immunity as to each question asked; (5) preemption of the subject matter of the investigation by the Federal Labor Management Relations Act; and (6) inadequate apprisal of purpose and pertinency, resulting in a denial of due process of law. The defendants also moved for a bill of particulars or, in the alternative, an order requiring answers to interrogatories. These discovery motions sought to compel the Commission, in effect, to produce for the defendants' inspection its entire investigative files relating to the work stoppage investigation, including intra-office communications as well as communications between the Commission and any state or federal officials. Defendants also demanded a jury trial and, lastly, moved to quash the subpoenas as having been exhausted when the defendants were purged of their prior contempt.

The matter was heard before the Law Division on November 21 and 22, 1961. The court heard extensive argument from both sides on the above motions and defenses. However, the trial judge announced that he was "not going to receive any testimony," and said he was "going to decide it [the case] on the record as I've got it." Later the court reconsidered its ruling and concluded that it would receive the testimony of the defendants for the limited purpose of pinpointing their fear of possible federal incrimination. Murphy's testimony concerning the basis for his fear of federal incrimination was as follows:

> "Q. What crimes could you possibly have been connected with as to result in a Federal charge against you or others, in combination with others, in conspiracy with others? A. That the American Export Lines is subsidized by the United States Government and could be sued, the union could be sued, and I could be sued, personally. Interstate commerce freight that was held up during the strike would bring in the Federal Bureau of Investigation, and the rights of watchmen working on the piers that could be in cahoots in pilferages, and stuff like that.
>
> Q. Also, were you aware of the fact it was the contention of the Waterfront Commission that you

> tried, and others together, in combination and conspiracy, to keep an individual from employment on the piers, namely, Mr. Markley? A. That's right.
>
> Q. And was that a reason for your exercising that privilege, yourself? A. That's right."

Moody's testimony concerning the basis for his fear of federal incrimination was as follows:

> "Q. And you exercised your privilege as you have just testified out of fear of incrimination of any Federal laws? A. That's right.
>
> Q. Will you tell the Court what you feared and pinpoint them and the respect? A. First, from the Waterfront Commission, they have, what they say, the right and authority to question. Now, there's, we say, pilferage, that they say, work stoppage, we had to do with the pilferage and we had to do with the work stoppage and the watchmen being not; in the ILA outside the ILA, that we tried to tell the watchmen what to do and what not to do, and to stop this one gentleman from getting hired on the pier. We don't do that, your Honor.
>
> * * * * *
>
> Q. You have just testified that the American Export Lines are engaged in interstate commerce, is that correct? A. That's right.
>
> Q. And that this stoppage, as contended by the Waterfront Commission was an illegal stoppage, was an interference with interstate commerce? A. That's right.
>
> Q. And is that why you fear incrimination? A. That's right.
>
> Q. And that it could lead to other evidence and tend to lead to other evidence that could possibly incriminate you? A. That's right."

The Law Division held that the Commissioners' designees had power to confer immunity on the defendants; that the Commission's letters to the officials of New York and New Jersey constituted adequate notice under the statute of its intention to confer immunity upon the defendants; that the defendants were adequately apprised of the subject matter of the investigation; and that the Commission was not required to grant the defendants immunity from federal prosecution. The court also expressed its doubt of the sincerity of the defendants' fear of federal criminal involvement. The court found the defendants guilty of both civil and criminal contempt. The court then disposed of the various motions of the defendants, *i.e.*, the motion to quash the subpoenas, the motions for discovery and the motion for jury trial, saying:

> "Those motions were motions directed to the discretion of the Court. However, the disposition of the matter on its merits finally disposed of them, but even in the exercise of discretion, none of those motions would be granted by this Court. So all the other motions are respectfully denied."

The court deferred imposition of sentence in order to secure a pre-sentence report from the probation department.

At the time of sentencing, the defendants' counsel urged that the court on October 4, 1961 had purged the defendants of their original contempt, and that thereafter in the proceedings before the Commission the defendants merely asserted their rights upon novel questions of law. The court noted that the defendants had refused to answer the questions in issue upon three different occasions, to wit, May 19, 1960, October 3, and October 27, 1961.

Though the court believed that the defendants had a "perfect right to interpose whatever legal objections were at their command," nonetheless the court was "constrained to believe that there has to be and there now is, at least for the present, an end to these witnesses being asked these questions." The court directed the Commission to prepare an order which would set out verbatim the questions that the defendants had refused to answer and which would order the defendants to stand committed until they responsively answered the questions; and the court further fined the defendants each $50.00 and sentenced them to jail for 30 days. The court also stated that the defendants, upon answering the questions, could apply to the court for an order purging them of contempt.

On this appeal, the defendants first point out that under the *Evidence Act, 1960* (N.J.S.A. 2A:84A-1 *et seq.*), the privilege against self-incrimination expressly extends to federal incrimination. They argue that since the Waterfront Commission declared that its grant of immunity to the defendants did not and could not extend to federal prosecutions, the Commission's orders to answer were in violation of the aforesaid Act.

The Commission argues that the defendants waived the privilege against self-incrimination by expressly declining to assert it at the first hearing before the Commission on May 19, 1960. The Commission further argues that since the defendants contended in the first contempt proceeding that the Commission's investigation constituted an unlawful interference with innocent conduct, *i.e.*, a labor dispute over which the National Labor Relations Board has exclusive jurisdiction, they are estopped from taking the inconsistent position in the present contempt proceeding that their testimony might implicate them in illegal conduct under federal law.

Though we think the defendants should have raised all their reasons for their refusal to answer, including the privilege against self-incrimination, at the hearing before the Commission on May 19, 1960, or at least in the contempt proceedings in the Superior Court which resulted in the judgments of June 20, 1960 holding them in contempt, we think that in the circumstances of this case the defendants should not be precluded from raising the issue of the privilege against self-incrimination. The Commission recognized the defendants' right to assert the privilege at its hearing of October 3, 1961, and the trial court on October 4, 1961 also recognized their right when it purged them of their original contempt. Moreover, at its hearing on October 27, 1961, the Commission clearly recognized the defendants' right to assert the privilege when it granted them immunity against prosecution. Finally, the contentions of waiver and estoppel were never raised by the Commission in the court below and therefore it may not raise them for the first time in this court.

We return to the defendants' argument regarding the validity of the Commission's grant of immunity. The Waterfront Commission act is an interstate compact, enacted by the States of New York and New Jersey in 1953 with the consent of Congress, 67 Stat. 541, Act of Aug. 12, 1953, c. 407, in order to eliminate evil conditions on the waterfront in the Port of New York Harbor. The Compact creates the Waterfront Commission as an agency of both States, with authority to license or register workers, and for good cause to refuse licenses and registrations, and to regulate labor and hiring practices on the waterfront. In order to further the elimination of waterfront evils, the Commission is empowered to investigate waterfront practices and other matters bearing on the objectives of the Compact, and to make recommendations to the two States for the improvement of waterfront conditions and for the effectuation of the purposes of the Compact. The members of the Commission and its properly designated officers may administer oaths and issue subpoenas throughout both States to compel the attendance of witnesses, the giving of testimony, and the production of other evidence. N.J.S.A. 32:23-10. "Witness" is defined in the Compact as "any person whose testimony is desired in any investigation, interview or other proceeding conducted by the commission pursuant to the provisions of this act." N.J.S.A. 32:23-85. Failure to obey a subpoena of the Commission is made punishable by the Superior Court in New Jersey and the Supreme Court in New York "in the same manner as said failure is punishable by such court in a case therein pending." N.J.S.A. 32:23-62. See also R.R. 4:46-5(c). For a history of this bi-state legislation see *Hazelton* v. *Murray*, 21 N. J. 115 (1956); *In re Application of Waterfront Com.*, 32 N. J. 323 (1960).

Under N.J.S.A. 32:23-86(5) of the Waterfront Commission Act, the Commission has explicit statutory power to grant immunity from prosecution in order to obtain the testimony of a witness who refuses to testify upon the ground of self-incrimination. The subdivision grants the Commission the power:

> "(5) To confer immunity, in the following manner: In any investigation, interview or other proceeding

conducted under oath by the commission or any duly authorized officer, employee or agent thereof, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made upon 24 hours' prior written notice to the appropriate Attorney-General of the State of New York or the State of New Jersey, and to the appropriate district attorney or prosecutor having an official interest therein, by the unanimous vote of both members of the commission or their designees appointed pursuant to the provisions of section 3 of article III of this act, that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this subdivision, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein.

" 'Immunity' as used in this subdivision means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by the unanimous vote of both members of the commission or their designees appointed pursuant to the provisions of section 3 of article III of this act, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence, in accordance with the order, and any

> such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt.
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> "Immunity shall not be conferred upon any person except in accordance with the provisions of this subdivision. If, after compliance with the provisions of this subdivision, a person is ordered to answer a question or produce evidence of any other kind and complies with such order, and it is thereafter determined that the appropriate Attorney-General or district attorney or prosecutor having an official interest therein was not notified, such failure or neglect shall not deprive such person of any immunity otherwise properly conferred upon him."

Section 3 of Article III, referred to in the above-quoted subdivision, reads in pertinent part as follows:

> "The commission shall act only by unanimous vote of both members thereof. Any member may, by written instrument filed in the office of the commission, designate any officer or employee of the commission to act in his place as a member whenever he shall be unable to attend a meeting of the commission." N.J.S.A. 32:23-9.

The immunity subdivision quoted above was enacted in 1956 in New Jersey (L. 1956, c. 194) and in 1957 in New York (*New York Laws* 1957, c. 188) as an agreement between the two States supplementary to the Waterfront Commission Compact and amendatory thereof. This legislation was enacted pursuant to the provisions of Article XVI, Section 1 of the Compact empowering the Legislature of either State, when concurred in by the Legislature of the other, to enact amendments and supplements to the Compact. N.J.S.A. 32-23-70. Thus, the immunity subdivision is in effect a part of the original Waterfront Commission Compact, to which Congress gave its consent.

N.J.S.A. 32:23-86(5), the immunity subdivision, is substantially the same as, and in fact was patterned after, § 2447 of the New York Penal Law. In the statement appended to S-385, which became Chapter 194 of the Laws of 1956, the purpose of the then-proposed subdivision was declared as follows:

> "[It] [a]uthorizes the 2 commissioners, acting unanimously, to grant immunity from criminal prosecution in connection with any commission investigation or proceeding, but only after notifying the appropriate prosecutor and Attorney-General and giving them an opportunity to point out why, in the particular case, the granting of immunity would not be in the public interest. Heretofore, a number of important investigations conducted by the commission in an effort to identify the real principals in kickback and other rackets on the waterfront have been thwarted by a valid claim of privilege against self-incrimination made by underlings. The commission could unseal such lips by granting immunity and compelling testimony from such underlings in cases where the public interest would thereby be served.
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> "The language of the section is practically identical with the provisions for granting immunity as codified through the efforts of the New York State Crime Commission and set forth in Section 2447 of the Penal Law of New York."

The United States Supreme Court has held that § 2447 of the New York Penal Law is valid notwithstanding a contention that it is unconstitutional to require a witness to testify upon the grant of immunity thereunder, where such witness' testimony might be used in a federal prosecution against him. *Knapp* v. *Schweitzer,* 357 U. S. 371, 2 L. ed. 2d 1393 (1958). In that case Mr. Justice Frankfurter, speaking for the Court, said:

> "In these days of the extensive sweep of such federal statutes as the income tax law and the criminal sanctions for their evasions, investigation under state law to discover corruption and misconduct, generally, in violation of state law could easily be thwarted if a State were deprived of its power to expose such wrongdoing with a view to remedial legislation or prosecution." *Id.,* 357 U. S. at 378-379, 2 L. ed. 2d at 1400.

In *Dunham* v. *Ottinger,* 243 N. Y. 423, 438, 154 N. E. 298, 302 (1926), the New York Court of Appeals, in answer to a contention that an immunity statute of that State was insufficient because it did not preclude the use of the testimony in federal criminal proceedings, said:

> "It [the statute] does give ample protection against the use of such testimony in our own tribunals, and it is perfectly well established that this is a sufficient immunity; that all that the state is required to or can do is to give immunity against its own processes, and, if it has done that, as this statute does it, it has satisfied the requirements of the Constiution."

The above rule has been stated by the United States Supreme Court in *United States* v. *Murdock*, 284 U. S. 141, 149, 76 L. ed. 210, 213 (1931):

> "[T]he lack of state power to give witnesses protection against federal prosecution does not defeat a state immunity statute. The principle established is that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination."

This rule has been recognized or followed in nearly all of the states in the nation, including New Jersey where the privilege against self-incrimination rests solely on a statutory and common law foundation. See *In re Pillo*, 11 N. J. 8, 16 (1952), and authorities cited therein. It is clear that prior to the enactment of the *Evidence Act, 1960* (N.J.S.A. 2A:84A-1 *et seq.*), the Waterfront Commission was empowered by virtue of the immunity subdivision to compel a witness, upon whom immunity had been conferred, to testify notwithstanding a claim by the witness of a fear of federal prosecution. See *In re Pillo, supra; Nusbaum* v. *Newark Morning Ledger Co.*, 33 N. J. 419, 424 (1960).

The defendants contend, however, that the above statement of law has been changed by virtue of the enactment of Rule 24 (N.J.S.A. 2A:84A-18) of the *Evidence Act, 1960* which expressly extends the provilege to matters which might tend to incriminate a witness under the laws of "this State, or another State or the United States," unless "it clearly appears that the witness has no reasonable cause to apprehend a criminal prosecution."[2] See *Nusbaum* v.

Newark Morning Ledger Co., supra, at 424. They further point out that Rule 2(1) N.J.S.A. 2A:84A-16(1) provides:

> "(1) The provisions of article II, Privileges [which include Rule 24], shall apply in all cases and to all proceedings, places and inquiries, whether formal, informal, public or private, as well as to all branches of government and by whomsoever the same may be conducted, and none of said provisions shall be subject to being relaxed."

The above rules obviously express a broad and liberal policy of our State to extend the scope of the privileges accorded to witnesses in this jurisdiction. However, the Legislature has recognized that the immediate implementation of such a policy might cause unforeseen conflicts with prior existing legislation, which would lead to undesirable consequences. Therefore, it has wisely chosen to proceed cautiously in a step-by-step manner, examining each piece of existing legislation which might be affected by a change in the scope of privileges, and allowing itself an opportunity to provide a specific legislative cure for any conflicts which might arise. Those existing statutes which the Legis-

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2. It must be noted that the privilege against self-incrimination accorded to a witness by the laws of New York extends only to crimes against that State, so that a grant of state-wide immunity is sufficient to compel testimony notwithstanding a claim of federal incrimination. *Waterfront Commission* v. *Marchitto,* 217 N. Y. Supp. 2d 487 (A. D. 1st Dept. 1961), leave to appeal denied, 10 N. Y. 2d 813, 178 N. E. 2d 231 (1961), *cert. den.* 368 U. S. 954, 7 L. ed. 2d 386 (1962); *Commission of Investigation* v. *Lombardozzi,* 180 N. Y. Supp. 2d 496 (A. D. 1st Dept. 1958), *aff'd,* 5 N. Y. 2d 1026; 158 N. E. 2d 250 (1959), 6 N. Y. 2d 878, 160 N. E. 2d 125 (1959), *cert. den. sub nom. Miranda et al.* v. *Commission of Investigation of the State of New York,* 360 U. S. 930, 3 L. ed. 2d 1543 (1959), *appeal dismissed sub nom. Mancuso* v. *Commission of Investigation of the State of New York,* 361 U. S. 10, 4 L. ed. 2d 50; see *Knapp* v. *Schweitzer, supra.*

lature had already examined and wished to repeal were expressly mentioned in the *Evidence Act* as being thereby repealed. N.J.S.A. 2A:84A-45. The Legislature also provided that this court may adopt rules of evidence, N.J.S.A. 2A:84A-33, but it further provided that any such rules shall not supersede any law in conflict or inconsistent therewith unless the conflicting or inconsistent law "shall be expressly identified by footnote to any rule so adopted." N.J.S.A. 2A:84A-40. Furthermore, in order to make clear its intention to avoid any unforeseen impairment of some existing statute, the Legislature expressly provided in Rule 24(4) (N.J.S.A. 2A:84A-16(4)):

> "(4) The enactment of the rules set forth in this act or the adoption of rules pursuant hereto shall not operate to repeal any statute by implication."

In the *Report of the [Legislative] Commission to Study the Improvement of the Law of Evidence* (1956), which is an authoritative guide to the interpretation of the *Evidence Act, 1960*, it was stated at p. 15 that Rule 2(4) (quoted above):

> "... has the effect of continuing all existing statutes. This Commission feels that it is necessary to review the New Jersey statutes in detail and to specifically treat each such statute dealing with evidence. Otherwise, a wholesale repeal of many statutes, without consideration of all the implications, would result."

In view of the above, it is clear to us that although the Legislature employed a broad brush in liberally extending the scope of the rules regarding privileges, it did not intend that, without further study and action, those rules should be applied as broadly as their language would otherwise permit or require. The question before us, therefore, is whether the expansion of the privilege against self-incrimination to include incrimination under federal law was intended by the Legislature to immediately impair the powers of the Waterfront Commission to investigate evil waterfront practices and to compel testimony after a grant of immunity from state-wide prosecution in New York and New Jersey. We think the Legislature had no such intention in mind when it passed the *Evidence Act, 1960.*

Iit is clear that in the formation of the Compact our Legislature, together with the Legislature of New York, intended to deal with joint problems existing throughout a single port area situated partly in New York and partly in New Jersey, and not with separate problems in separate ports of each State. From the standpoint of geography, commerce, and waterfront working conditions, New York Harbor is an organic whole, although politically, the harbor is split between the law-making authority of the two States. Plainly, these joint problems could not be adequately dealt with except through the coordinated efforts of the two States and the United States. The situation called for unified action. As a consequence, the Waterfront Commission, a single bi-state agency, was established with the consent of Congress to administer a joint legislative program throughout the Port of New York District, embracing the New York—New Jersey waterfront. Both States ceded certain governmental powers to this autonomous bi-state agency. These powers, as mentioned earlier in this opinion, include the power to make appropriate investigations, subpoena witnesses, and compel testimony after a grant of immunity against prosecution in both States. See *Application of Waterfront Comm. of N. Y. Harbor,* 39 N. J. Super. 33 (Law Div. 1956). The objectives of the Compact were to provide for uniform treatment of a unique, bi-state problem. Such uniformity, in order to be effective, must be maintained throughout the life of the Compact. See Frankfurther and Landis, *The Compact Clause of the Constitution—A Study of Interstate Adjustments,* 34 Yale L. J. 685, 698 (1925). In short, the Waterfront Commission, when acting within the orbit of the governmental responsibility which the States have expressly or by fair implication agreed to vest in it, was intended to be free from any unilateral restraint by either State which might thwart the Commission in its efforts to eliminate evil conditions in an area where there is extensive activity in international and interstate commerce. *Cf. State* v. *Murphy,* 36 N. J. 172, 186-187 (1961). Indeed, it is doubtful whether a single legislature could unilaterally impair the powers of the Waterfront Commission, even if it so desired. See *Green* v. *Biddle,* 8 Wheat. 1, 5 L. ed. 547 (1823); *President, Managers, &c.* v. *Trenton City Bridge Co.,* 13 N. J. Eq. 46 (Ch. 1860); see also, *Comment,* 45 Yale L. J. 324, 329 (1935).

If, as defendants contend, a witness may claim the privilege against self-incrimination with respect to federal crimes notwithstanding a conferral of bi-state immunity by the Commission, it would follow that there could be no effective investigation not only of the state aspects of such crimes but even of the non-criminal aspects of waterfront conditions since possible federal criminal overtones are frequently present. This is so because of the nature of waterfront activity and its constant involvement with interstate commerce and other such areas of federal jurisdiction. Since the Commission cannot grant immunity as to the federal crimes it will remain helpless. The difficulty is not merely fanciful; it might well result that investigations by the Commission would be seriously hampered and, in many cases, frustrated.

Moreover, an interpretation of the Compact which is not uniform in both States would lead to results disruptive of the investigative process of the Commission. It might mean that different witnesses would have different rights depending on which side of the Hudson River they lived, or on which side the events in question took place. It might also mean that the same witnesses would have different rights depending on which side of the River they appear for examination or are prosecuted for contempt.[3] Certainly, our Legislature in adopting the *Evidence Act, 1960* never intended such results.

For the above reasons, we hold that Rule 24 of the *Evidence Act, 1960* does not entitle the defendants to refuse to testify after the Commission has conferred immunity upon them.[4]

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[3] See *Waterfront Commission* v. *Marchitto, supra,* where the defendant, a New Jersey resident, was successfully prosecuted in the New York courts for contempt arising out of his refusal to answer questions pertaining to his activities in New Jersey, propounded at a Commission hearing in New York City.

[4] Of course, it is not for us to say whether the Commission's grant of immunity would be honored in a federal criminal proceeding. In *Feldman* v. *United States*, 322 *U. S.* 487, 88 *L. ed.* 1408 (1943), *rehearing denied*, 323 *U. S.* 811, 89 *L. ed.* 646 (1944), it was held by a 4 to 3 vote that testimony of a defendant previously compelled

In view of the above conclusion, it is unnecessary for us to pass upon the Commission's contention that the defendants failed to establish in the Superior Court a reasonable basis for their asserted fear of federal incrimination.

The defendants further contend that having purged themselves of contempt under the subpoenas returnable before the Commission at its first hearing in May 1960, those subpoenas were exhausted and could not be made the basis for the proceedings before the Commission on October 27, 1961. The subpoenas had been made returnable on May 18, 1960 "and at any adjourned date thereof." As mentioned earlier in this opinion, the defendants appeared before the Commission on October 3, 1961 and refused to testify upon the ground of self-incrimination. The Commission recognized the defendants' invocation of the privilege and adjourned the subpoenas until October 10, 1961, so that the Commission could decide whether to confer immunity from prosecution upon the defendants. The following day, October 4, 1961, the parties appeared before the Superior Court, which ruled that the defendants had purged themselves of their previous contempt. However, the court further

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under the sanctions of a state immunity statute could be used against him in a federal prosecution. If *Feldman* were overruled, and state-compelled testimony held inadmissible in the federal courts, a witness would be free to testify under a state immunity grant without running the risk of a subsequent federal prosecution based upon such compelled testimony. In *Kroner, Self Incrimination: The External Reach of the Privilege*, 60 *Colum. L. Rev.* 816, 837, *n* 155 (1960), the author observes: "That this [overruling *Feldman*] is not unlikely is suggested by the fact that 4 Justices now on the Court appear to favor such a result. Justices Black and Douglas were among the dissenters in *Feldman*. See 322 *U. S.* at 494. Mr. Chief Justice Warren, in dissent and Mr. Justice Brennan, in a concurring opinion, indicated in *Knapp* v. *Schweitzer* that the time was ripe for review of the *Feldman* rule. See 357 *U. S.* at 381."

ruled that the subpoenas were still in effect and noted that the Commission had adjourned the subpoenas until October 10, 1961. Counsel for the defendants agreed that they would appear at the appointed time, and the court entered an order to that effect. The hearing of October 10, 1961, was adjourned until October 27, 1961, with the consent of all the parties, at which time the defendants appeared. Since the court ordered the defendants to appear and they consented to such order, and did appear before the Commission on October 27, 1961, their contention that the power of the subpoenas to compel their appearance had been exhausted is clearly without merit.

The defendants also contend that the Commission's grant of immunity was invalid because: (1) the letters sent by the Commission to the officials of New York and New Jersey advising them of the Commission's intention to confer immunity upon the defendants were not sufficiently informative "to enable those officers to arrive at any rational judgment as to whether the case is an appropriate one for concurrence by such law officers in the Commission's proposed granting of immunity"; (2) not all such law officers having an official interest in the subject matter were notified; (3) the Commissioners' appointment of designees to confer immunity upon the defendants was an improper delegation of power;[5] and (4) the Commission did not make the grant of immunity explicit as to each question asked.

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[5] The defendants hint that the Legislature could not constitutionally delegate to the Commissioners themselves the power to grant immunity. However, they do not press this point and in any event, we would not consider it since the Attorney-General was not notified that the constitutionality of a statute was under attack. R. R. 4:37-2; *Bergen County Sewer Authority* v. *Little Ferry*, 5 *N. J.* 548, 554 (1950).

N.J.S.A. 32:23-86(5) provides that the grant of immunity by the Commission shall be "upon 24 hours' prior written notice to the appropriate Attorney-General of the State of New York or the State of New Jersey, and to the appropriate district attorney or prosecutor having an official interest therein." Pursuant to this provision, the Commission mailed letters to the Attorneys-General of New York and New Jersey, the District Attorney of New York County, and the Prosecutor of Hudson County. These letters set forth the Commission's intention to confer immunity upon the defendants in an investigation "into a strike that took place at the American Export Line Terminal in Hoboken, New Jersey on May 16 through May 20, 1960." The letters further recited the history of the proceedings, including the fact that the defendants refused to answer questions concerning their participation in the strike on the grounds that their answers might tend to incriminate them. Although there is nothing in the immunity subdivision requiring receipt of replies to the letters of notice, letters were received from both Attorneys-General and from the District Attorney of New York County, informing the Commission that these officials had no objections to the proposed grant of immunity to the defendants. (No reply was received from the Hudson County Prosecutor.)

Although, as said above, the defendants contend that the Commission's letters of notice were not sufficiently informative, they do not suggest what further facts would be necessary in the circumstances. Since the letters clearly informed the officials as to the specific nature of the inquiry, and gave them an opportunity to be heard if they saw fit in order that they might persuade the Commission to withhold the granting of immunity, we think the letters were amply sufficient to comply with the statute. In any event, the immunity granted under the subdivision protects the defendants even if the law officials were not properly notified. The requirement of giving notice to the officials is not a *sine qua non* to the grant of immunity. We agree with what was said in *Commission of Investigation* v. *Lombardozzi, supra,* 180 N. Y. S. 2d at 503, where the court was construing an immunity statute substantially identical to the one *sub judice:*

> "When requested in these proceedings, the Commission informed each appellant that it had afforded the Attorney-General and the appropriate district attorney an opportunity to be heard in compliance with section 7 but refused to specify the details thereof. We find no error in that decision. The grant of immunity was absolute. It appears to have been the legislative intent that before such extensive power was exercised by the Commission, as a matter of governmental comity, it should give certain public prosecutors an opportunity to be heard to enable them to induce the Commission to withhold the granting of such immunity for reasons advanced, which might have been unknown, or overlooked by the Commission. But the opportunity to be heard was not a restriction on the power. If objections were made by prosecutors and not heeded by respondent, the witness would not be the less protected. Assuming the Commission acted improvidently in the face of objections it might be subject to correction in an official forum or otherwise. Such eventual correction, regardless of what effect it might have on the Commission, individually, or as a body, could not detract from the immunity already

> granted. Thus, in stating that the Attorney-General and appropriate District Attorney had been afforded an opportunity to be heard, the respondent sufficiently complied with the statute. It was not for appellants to go further into the matter. When the immunity is granted it is not at the peril of the witness but at the peril of the Commission if it fails to comply with the requirements of the statute."

We find no merit in the defendants' contention that not all of the law officials "having an official interest" in the proposed grant of immunity were notified in compliance with the immunity subdivision. The defendants do not suggest which other law officials should have been notified by the Commission. Moreover, what has been said in the preceding paragraph adequately answers this contention.

We further find no basis for the defendants' attack upon the validity of the appointment of the designees by the Commissioners to act in their places for the purpose of conferring immunity. N.J.S.A. 32:23-86(5) provides that immunity may be conferred by the Commissioners "or their designees appointed pursuant to the provisions of section 3 of article III of this act." In turn, this latter section (N.J.S.A. 32:23-9) provides that though the Commissioners can act only by unanimous vote of both members, "Any member may, by written instrument filed in the office of the commission, designate any officer or employee of the commission to act in his place as a member whenever he shall be unable to attend a meeting of the commission." Pursuant to these provisions, Commissioners Thompson and Tyler designated William P. Sirignano and Myles J. Ambrose, respectively, to act in their places as members of the Commission in the present investigation on any occasion when the Commissioners were unable to attend, and to confer immunity upon the defendants. The defendants point out that the Commissioners' instruments of designation were executed on October 13, 1961, were unlimited as to time, and were actually put to use by the designees on October 27, 1961. They argue that a Commissioner as "a gubernatorially-appointed official [should not] be permitted to strip himself of what is probably his most solemn statutory function in this indiscriminate manner."

The short answer to this contention is that here there has been no such stripping of power by the Commissioners; the designation is clearly limited to a specific investigation, for a specific purpose, and may be exercised only on those occasions which the Commissioners themselves are unable to attend. There is nothing in the record to suggest that the Commissioners were free to attend the hearing on October 27, 1961.

We find no substance to the defendants' final challenge to the validity of the Commission's grant of immunity, *i.e.*, that the grant was not explicit as to each question on which the defendants' claims of privilege were overruled. The immunity subdivision provides: "In any investigation, . . . if a person refuses to answer a question . . . on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made . . . [after due notice to appropriate officials and by the unanimous vote of both commissioners or their designees] that such person answer the question . . . , such person shall comply with the order. If such person complies with the order, and if, but for this subdivison, he would have been privileged to withhold the answers given . . . , then immunity shall be conferred upon him. . . .'' It is clear from the above that the immunity is conferred by operation of the statute, and not by some ritualistic statement of the examining officer. In the proceedings before the Commission on October 27, 1961, the provisions of the immunity subdivision were read and explained to the defendants and their counsel. Each time a defendant refused to answer a question on the ground of self-incrimination, the Commissioners' designees unanimously ordered the defendant to answer that question notwithstanding his claim of the privilege. This procedure complied with the statute and was therefore sufficient to cloak the defendants with the statutory immunity.

The defendants next contend that they were denied due process of law by the Commission's refusal to adequately apprise them as to the "purpose and pertinency" of the investigation. The Supreme Court of the United States has made clear that a witness before an investigative body is entitled to be adequately apprised of the subject matter of the investigation, and of the manner in which the questions asked are pertinent thereto, in order that he may determine whether he would be within his rights in refusing to answer. *Scull* v. *Commonwealth of Virginia,* 359 U. S. 344, 3 L. ed. 2d 865 (1959); *Watkins* v. *United States,* 354 U. S. 178, 1 L. ed. 2d 1273 (1957); see *In re Application of Waterfront Com.,* 32 N. J. 323, 336-338 (1960).

The defendants acknowledge that when they appeared before the Commission on October 3, 1961 and thereafter, they stood apprised that the purpose of the Commission's May 1960 investigation was to inquire into the work stoppage of May 16-20, 1960 on the American Export Lines' piers in Hoboken, in order to determine whether the work stoppage constituted a threat to the port-watchman security system by preventing Markley from functioning on the piers, and whether any violations of the Compact were involved. However, the defendants contend that their right to an adequate apprisal extends beyond the above recital of purpose. They urge that they are entitled to be "apprised" of any damaging information which the Commission might have against them, and to be confronted with any accusatory witnesses, in order that they might have "an opportunity to make a rational judgment of the necessity and advisability of invoking the self-incrimination privilege"; that they should not be placed "in the position of having to decide in the dark whether or not they should incur the grievous legal and social disadvantage of invoking the privilege of self-incrimination." The defendants cite no authority for this proposition, conceding it is "*de novo* in any jurisdiction." We think this point is wholly without substance. The defendants' argument assumes that the questions propounded called for an answer which might tend to incriminate them, and as to which, therefore, they might properly assert their privilege. Their contention, in effect, is that some incriminating questions might safely be answered if they knew beforehand that the Commission did not have enough other damaging information to make a future prosecution likely. In other words, they do not wish to be put in the position where they must make the distasteful choice of invoking the privilege unless they are certain it is necessary in order to protect themselves from a future prosecution.

We know of no rule, constitutional or otherwise, which provides that when, as here, the subject matter of the inquiry and the pertinency thereto of questions have been made clear to a witness, he is entitled to be given further information before deciding whether to exercise his privilege against self-incrimination. If the Commission were thus compelled to disclose the contents of its files, then the whole investigative process would be subject to scrutiny before the investigation had even gotten under way, and in most cases the investigation would be thwarted. See *In re Application of Waterfront Com., supra,* 32 N. J. at 334. Investigations to determine whether there are evil conditions on the waterfront are too important to be shackled by recalcitrant witnesses, whose privileges against self-incrimination are amply protected, merely because of some asserted disadvantage which would seem at best to be of a nebulous nature. Due process of law does not require that the niceties of personal feelings be allowed to obstruct the search for truth. *Cf. In re Vince,* 2 N. J. 443, 457 (1949).

In connection with the defendants' contentions with regard to the Commissioners' appointment of designees, the adequacy of notice to the law officials of both States, and their demand for apprisal as to any damaging information or accusatory witnesses, the defendants moved before the trial court for discovery in the form of interrogatories and a bill of particulars. In view of our above disposition of these contentions, however, it follows that the defendants were not entitled to any further information regarding them. The defendants' discovery motions also sought information with regard to whether the Commission's present investigation was within its statutory jurisdiction. The defendants are foreclosed from raising that issue in these proceedings, however, since it was the sole subject of the defendants' first appeal to this court, wherein we held that the Commission had jurisdiction to conduct the present investigation. *In re Application of Waterfront Comm. of N. Y. Harbor,* 35 N. J. 62 (1961). Therefore, the trial court was correct in denying the defendants' motions for discovery.

Nor was there error in the trial court's denial of the defendants' demand for a jury trial. Both R.R. 3:8-3, having to do with criminal contempts, and R.R. 4:87-3, having to do with contempts generally, upon which the defendants relied in their demand, specifically provide that "[t]he court in its discretion may try the issue without a jury." See *Green* v. *United States,* 356 U. S. 165, 2 L. ed. 2d 672 (1958). We find that the trial court did not abuse its discretion in hearing the matter without a jury.

The defendants also contend that the commingling of the criminal and the civil contempt proceedings before the trial court was error, and that such error was compounded by the restrictive nature of the trial. We are satisfied that the defendants had a fair trial with regard to the issue of civil contempt, *i.e.*, whether they should be incarcerated until they have answered the questions propounded by the Commission. The defendants do not dispute the facts that were presented to the trial court, and their contentions as to the legality of the proceedings before the Commission have already been disposed of in the course of this opinion. We therefore conclude that the trial court properly found the defendants guilty of civil contempt.

However, we think that the judgments holding the defendants guilty of criminal contempt must be reversed. In

N. J. Dept of Health v. *Roselle,* 34 N. J. 331, 344 (1961), we expressed grave doubts whether a defendant's rights could be adequately protected in a "double-barrelled proceeding," where charges of both civil and criminal contempt are tried in a common hearing. Although the defendants did not specifically object to the dual aspects of the trial below, they did make known their desire to have an opportunity to introduce evidence on the question of intent to commit a criminal contempt. From our examination of the record, it appears that the defendants were exposed to criminal punishment without being afforded the opportunity to present evidence in their defense, if any, and in extenuation of the offenses charged and in mitigation of the penalties to be imposed. The trial court's refusal to hear any evidence, except for the limited purpose of pinpointing the areas of possible federal incrimination, denied the defendants the safeguards to which they were entitled as persons charged with criminal offenses. See *Cooke* v. *United States,* 267 U. S. 517, 537, 69 L. ed. 767, 774 (1924); *N. J. Dept. of Health* v. *Roselle, supra,* at 338-340.

For the reasons expressed above, the judgments of the Law Division insofar as they hold the defendants guilty of criminal contempt are reversed and the matters are remanded to the Law Division for new trials. The judgments of the Law Division are affirmed insofar as they order the defendants to be incarcerated until they make "responsive answers to the aforesaid questions [set out in the judgments] before the members of the Waterfront Commission of New York Harbor, or their designees . . . , as well as until such fine[s]" ($50.00 each) have been paid.

A TRUE COPY

JOHN H. GILDER

Clerk

APPENDIX B

Opinion of Superior Court of New Jersey, Law Division, Hudson County, on Judgment Here Sought to be Reviewed

Oral Decision (November 22, 1961)

(2) The Court: I will first consider the motion presented under the Order to Show Cause pusuant to R. R. 4:46-5(c), requiring the respondents, William Murphy and John Moody, Sr., to show cause before this Court why they should not be punished for a contempt of Court.

These respondents also move for an order quashing the subpoenas which have been issued heretofore requiring their attendance before the Waterfront Commission of New York Harbor at its offices, 15 Park Row, New York City, New York.

These two motions, by consent of counsel, were consolidated.

The defendants further move for a bill of particulars and seek, under adverse conditions, a jury trial in these proceedings for civil and criminal contempt.

The witnesses, or the respondents, also move for answers to certain interrogatories which they demand of the Commission.

The events leading up to this Order to Show Cause and the various motions are as follows:

One James H. Markley was an investigator for the Commission, assigned principally to cover (3) the piers and terminals of the American Export Lines in Hoboken. On or about May 16, 1960, Markley left the employ of the Waterfront Commission in order to work for American Export as a security officer. To fulfill his security functions, Markley obtained a license from the Commission permitting him to operate as a port watchman.

On May 16, 1960, the day Markley was to commence work for American Export, the longshoremen and checkers employed by American Export in Hoboken did not report for work. With the exception of the morning of May 17th, the work stoppage continued until May 25th. The striking employes were members of Hoboken Local number 2 of the Independent Longshoremen's Association (ILA). Respondent Moody is an organizer for the ILA in New Jersey, and respondent Murphy is business agent for Local number 2.

The Waterfront Commission had information that the work stoppage was "a concerted effort to keep James H. Markley off the piers of the American Export Lines." Accordingly, it instituted an investigation to determine whether any persons registered or licensed by the Commission were (4) violating the Waterfront Commission Act (N. J. S. A. 32:23-1, etc.) by coercing an employer (American Export) to limit the functions of or discharge a licensed port watchman (Markley).

In connection with the investigation the Commission served subpoenas ordering the respondents to appear and testify. When these gentlemen appeared on May 19, 1960, at the Waterfront Commission offices at 15 Park Row, New York City, New York, they were told that they were subpoenaed for the purposes of making an investigation under Article IV of the Waterfront Commission Compact and to ascertain facts surrounding a work stoppage at Piers A, B, and C, Hoboken, New Jersey.

Respondent John Moody, Sr., gave his name and address, testified he was a union official, and refused to answer the following questions:

"Question: Are you an official of any ILA Local?"

"Question: Mr. Moody, will you tell us what local you are an official of?"

"Question: Mr. Moody, what position do you hold with the local ILA that you are affiliated with?"

"Question: All right, Mr. Moody, would you (5) tell us when you first received news of any labor trouble on Piers A, B, and C in Hoboken?"

"Question: Mr. Moody, within the last weeks have you attended any conferences with the officials of the American Export Line with respect to the work stoppage at Piers A, B, and C in Hoboken?"

"Question: Have you had any conversation with Captain Andrews, Leland Andrews, of American Export Line with reference to the stoppage this week at Piers A, B, and C in Hoboken, New Jersey? When I say this week, I mean from May 16th to the present."

"Question: Mr. Moody, have you had any discussions or conversations with Captain Blackledge of American Export Lines concerning the refusal to work at Piers A, B, and C of longshoremen in that particular—on those particular piers this week?"

"Question: Have you had any conversations with Michael McNamara, Senior, Hiring Agent of the American Export Lines, concerning the work stoppages at Piers A, B, and C that have occurred since May 1, 1960, to the present?"

"Question: Mr. Moody, have you at any time (6) either prior to the work stoppage which commenced on May 16, 1960, or before that time or after that time, did you at any time issue orders for a work stoppage at Piers A, B, and C?"

"Question: Did you, before May 16th, ever give any orders for the commencement of a work stoppage at Piers A, B, and C?"

"Question: Have you since May 16th, in other words, May 16th, 17th, 18th, and 19th, have you on these particular days issued any instructions concerning work stoppages and instructions, now both either commencing or ceasing the stoppages at Pier A, B, and C in Hoboken?"

"Question: Have you had any conversations with anyone since May 16, 1960, to the present concerning the work stoppages at Piers A, B, and C?"

"Question: What is your function with the local in Hoboken?"

"Question: What is your position with the union?"

"Question: Mr. Moody, were you present on Piers A, B, and C, Hoboken, on Monday, this week?"

"Question: Were you at the piers on Tuesday?"

Respondent Murphy testified that he was a (7) business agent of Local number 2 and represented members of the local working at the American Export facilities in Hoboken. He stated that he knew the longshoremen did not work on May 16, 1960, and that it was common knowledge for the ten day preceding May 16th that things were not normal at the American Export piers.

Respondent Murphy refused to answer the following questions:

"Question: Now, for the record, Mr. Murphy, did you have anything to do with causing the strike that is presently pending at the American Export Line?"

"Question: Did you in any way participate in the work stoppage to compel the American Export Line to discharge or to limit the duties of their employee James Markley?"

Mr. Murphy refused to give any further testimony to answer the foregoing questions.

Mr. Murphy and Mr. Moody based their refusals to testify on the following grounds:

1. The work stoppage is a matter which the Commission has no statutory authority to investigate.

2. The work stoppage is a matter over (8) which the National Labor Relations Board has exclusive jurisdiction.

3. The Commission has no right to investigate the work stoppage since civil litigation may ensue as a result thereof. (The American Export Lines had threatened to sue the ILA).

4. The Commission's investigation seeks to inquire into a privileged communication between union and management and/or between union representatives.

Neither defendant asserted his privilege against self-incrimination.

The Commission's interrogator overruled the defendants' objection to the question, directed them to answer, and informed them that continued recalcitrance would subject them to contempt proceedings. Defendants persisted in their refusal.

Thereupon the Commission instituted contempt proceedings against the defendants, Murphy and Moody, in the Superior Court of New Jersey, Hudson County, which by judgment dated June 20, 1960, adjudged Murphy and Moody guilty of civil contempt and ordered that they be fined $50.00 each and that they be incarcerated until they (9) obeyed the Commission's subpoenas. The judgment of contempt against Murphy and Moody was affirmed by the Supreme Court of New Jersey by mandate dated May 22, 1961. A copy of the printed record upon the appeal is annexed as Exhibit C to plaintiff's moving papers herein, and a copy of the mandate of the Supreme Court as Exhibit D.

Thereafter Murphy and Moody appealed to the Supreme Court of the United States and applied to the Supreme Court of New Jersey for a stay pending such appeal, which application was denied by the Supreme Court of New Jersey on August 14, 1961. Appellants then applied to Mr. Justice Brennan of the United States Supreme Court for a stay pending appeal, which application was denied by Mr. Justice Brennan. Application was then made to Mr. Justice Brennan for reconsideration of his denial of a stay and for oral argument in connection therewith. This second application was also denied by Mr. Justice Brennan on September 29, 1961.

The defendants, Moody and Murphy, appeared before this Court on October 3, 1961, pursuant to the mandate of the Supreme Court of New Jersey. At that time they were directed to appear at the (10) offices of the Commission pursuant to the Commission's subpoenas. They did so appear as directed on October 3, 1961.

Again the defendants were advised that the purpose of the investigation was to inquire into the factual background of the work stoppage that took place on May 16, 1960, and through May 20th at Piers A, B, and C in Hoboken, to inquire whether or not a violation of the Compact took place.

Mr. Murphy testified that he was business agent for Local 2 of the International Longshoremen's Association. Mr. Murphy refused to answer the following questions:

"Question: And as such business agent, what are your duties, Mr. Murphy?"

"Question: Mr. Murphy, when did you first become aware that on May 16, 1960, a work stoppage had taken place at Piers A, B, and C, Hoboken, the American Export Line Terminal?"

"Question: Did you have any conversations, Mr. Murphy, with union officials of the ILA prior to May 16, 1960, concerning the presence of one James Markley on Piers A, B, and C as a security officer for the American Export Lines?"

(11) "Question: Did you have any conversations with the officials of American Export Line on May 16, 1960, May 17, 1960, May 18, 1960, May 19, 1960, and May 20, 1960, concerning the presence of James Markley as a security officer on Piers A, B, and C, Hoboken?"

"Question: Mr. Murphy, did you at any time during the period covered by the dates May 16th to May 20, 1960, appear on the terminal or in the offices of the terminal at Piers A, B, and C, Hoboken, in connection with the work stoppage that resulted on the days May 16th to May 20th?"

"Question: Mr. Murphy, did you at any time prior to May 16, 1960, speak with one Michael McNamara, Hiring

Agent at the American Export Lines Piers, concerning the presence of James Markley as a security officer on those particular piers?"

John Moody, Sr., gave his address and testified that he was an organizer of the ILA in the State of New Jersey. Mr. Moody, Sr., refused to answer the following questions:

"Question: In that position and in respect to that position, what are your duties, Mr. Moody?"

"Question: Mr. Moody, would you tell us when (12) you first became aware of labor trouble at Piers A, B, and C in Hoboken on or about May 16th, during the period covered from May 16, 1960, through May 20, 1960?"

"Question: Mr. Moody, with respect to the work stoppage that occurred on May 16, 1960, at Piers A, B, and C in Hoboken, did you have any conversations with any of the union officials about the presence of one James Markley as a security officer on the said terminal?"

"Question: Mr. Moody, did you have any conversations covering the work stoppage that occurred on May 16, 1960, with officials of American Export Line, specifically Leland Andrews or others, such as Captain Blackledge, concerning the presence of James Markley on the terminal as a security officer?"

"Mr. Moody, were you physically present at Piers A, B, and C in Hoboken on May 16, 17, 18, 19 and 20, 1960?"

"Question: Mr. Moody, did you have any conversations with Michael McNamara on May 16, 17, 18, 19, or 20, 1960, concerning the presence of Markley, James Markley, a security officer on the Hoboken Terminal?"

(13) "Question: Mr. Moody, did you ever meet with any of the executives of American Export Lines with respect to settlement of the dispute concerning Markley's presence as a security officer on Piers A, B, and C in Hoboken?"

"Question: Did you ever speak to Michael McNamara prior to May 16, 1960, concerning the presence of James Markley as a security officer on Piers A, B, and C, Hoboken?

"Question: Now, Mr. Moody, did you at any time issue orders for a work stoppage on Piers A, B, and C, Hoboken, because of the presence of James Markley on Piers A, B, and C?"

"Question: Mr. Moody, have you since May 16, 1960, issued any instructions concerning work stoppages either commencing or stopping the stoppage at Piers A, B, and C, Hoboken?"

The respondents in this case, Murphy and Moody, based their refusal to answer the set out questions on the grounds that they had not been properly and adequately apprised of the purpose of the investigation and on their privilege of self incrimination.

The subpoena was adjourned to October 10, 1961. The Commission was going to determine (14) whether it wished to confer immunity upon the witnesses and to provide for appropriate notice to the district attorneys involved.

On October 4, 1961, the respondents, William Murphy and John Moody, Sr., appeared again before this Court at which time this Court decided that they had purged themselves of their contempt, as the Commission had recognized as a proper ground and legal basis for their refusing to answer those particular questions, as the records shows, the basis of their constitutional right that their answers might tend to incriminate them. This Court further found the subpoenas still to be effective and returnable on October 10, 1961.

On October 27, 1961, the duly adjourned return date of the Commission's subpoenas, the defendants, Murphy and Moody, appeared at the offices of the Commission. The Commission introduced into evidence the following:

Designations authorizing Myles J. Ambrose to act in the place of Commissioner Harold R. Tyler, Jr., to confer immunity upon William Murphy and John Moody, Sr., marked Commission's Exhibits 1 and 2.

Designations authorizing William P. Sirignano (15) to act in the place of Commissioner David C. Thompson to confer immunity upon William Murphy and John Moody, Sr., marked Commission's Exhibits 3 and 4.

Letters of notice of granting immunity to William Murphy and John Moody, Sr., which were mailed to the following:

Honorable Lawrence Whipple, Prosecutor of Hudson County.

Honorable David Furman, Attorney General of New Jersey.

Honorable Frank Hogan, District Attorney of New York County.

Honorable Louis Lefkowitz, Attorney General of New York.

Also offered into evidence by the Commission were the following:

Letter from David D. Furman acknowledging receipt of the previously offered letter.

Letter from Frank Hogan acknowledging receipt of the same letter.

Letter from office of Louis Lefkowitz regarding the same letter.

However, no acknowledgment was received from Lawrence Whipple, Prosecutor of Hudson County.

(16) The respondents, or the defendants, William Murphy and John Moody, Sr., were apprised that the investigation concerned a stoppage of work that occurred on the morning of May 16, 1960, at the Hoboken Terminal of the American Export Lines, Piers A, B and C in Hoboken and, further, that the parties were there to discover whether there were any violations of the Compact.

The defendants were then informed of section 5-b(5) of the Waterfront Commission Act and its passages wherein the power to grant immunity from prosecution is set forth were read to them. They were then instructed as follows:

> "If a question is asked of you and you honestly believe the answer may incriminate you, you may plead that privilege and you do not have to answer the question, except that where the Commission orders you and directs you to answer that question, you must answer it. Only you get this benefit from that direction: that any transaction concerning which you testify, you will be held immune from that and any answer you may give or evidence that you produce cannot be used against you."

(17) No grant of immunity from federal prosecution was expressed.

Mr. William Murphy refused to answer the following questions:

"Question: Are you an official of the ILA, Independent?"

"Question: I direct your attention to a work stoppage that occurred on Monday, May 16, 1960, at Piers A, B, and C, Hoboken, the American Export Lines Terminal. Did you have any prior knowledge that a work stoppage would occur Monday, May 16, 1960, at the said terminal?"

"Question: Mr. Murphy, who were the persons that gave you the information about the work stoppage on May 16, 1960, at the Hoboken Terminal of the American Export Line?"

"Question: Mr. Murphy, did you at any time give orders to longshoremen or others such as shop stewards that a work stoppage was to take place on May 16, 1960, at the American Export Line Terminal in Hoboken?"

"Question: Mr. Murphy, was the work stoppage that took place on the American Export Line Pier on May 16, 1960, related to the presence of one James Markley on the piers as a (18) security officer?"

"Question: Mr. Murphy, do you know whether the work stoppage that took place on May 16, 1960, at the American Export Line Terminal was related to the presence of one James Markley on the piers as a security officer?"

"Question: Mr. Murphy, did you have any conversations with any union officials of the ILA prior to May 16, 1960, about the presence of James Markley on the Hoboken Terminal as security officer?"

"Question: On May 16, 1960, did you, Mr. Murphy, have a conversation with one Leland Andrews concerning this work stoppage that took place on May 16, 1960, at the American Export Line Pier?"

"Question: Did you in the conversation with Mr. Andrews on the 16th of May, 1960, reach any agreement over the presence of Mr. Markley on the Hoboken Terminal of the American Export Lines in Hoboken?"

"Question: Mr. Murphy, on the morning of May 17, 1960, were you on the American Export Line Hoboken Terminal?"

"Question: Mr. Murphy, on May 17, 1960, at (19) the Hoboken Terminal of the American Export Line did you have a conversation with one Michael McNamara?"

"Question: Mr. Murphy, on the morning of May 17, 1960, at the American Export Line Terminal in Hoboken did you have a conversation with one Frank Rump?"

"Question: Mr. Murphy, on the morning of May 17, 1960, did you have a conversation with one Carmen Bruno?"

"Question: Mr. Murphy, on the morning of May 17, 1960, at the Hoboken Terminal did you have a conversation with one Eric Lumpke?"

"Question: Mr. Murphy, on the morning of May 17, 1960, did you have a meeting with officials of the American Export Line?"

"Question: Did you at that time reach any agreement concerning the presence of Mr. Markley on the Hoboken Terminal as a security officer?"

"Question: Mr. Murphy, did you have a meeting with the Executive Vice President of American Export Line at the offices of the American Export Line at 39 Broadway in New York City in August, 1960?"

(29) "Question; Mr. Murphy, did you at that meeting with the Executive Vice President of the American Export

Line state that if Mr. James Markley walked on the Piers A, B, and C in Hoboken there would be a strike?"

"Question: Did you, Mr. Murphy, ever discuss or give any orders to any shop stewards or officials of your local to pull the men out on Piers A, B, and C in the event Mr. Markley walked onto the piers in May of 1960 in the performance of his duty as a security officer for the American Export Lines?"

"Question: Mr. Murphy, do you know now whether Mr. Markley has ever, since May, 1960, walked on the piers in Hoboken, New Jersey, of the American Export Lines in connection with his duties as a security officer for that company?"

"Question: Mr. Murphy, do you know if Mr. Markley was at any time employed by this commission in any capacity whatsoever?"

"Question: Mr. Murphy, is it not true that the statement you made to the Vice President of the American Export Line in August, 1960, that if Mr. Markley steps on the Hoboken Terminal there would be a strike, is still in force today and (21) that Mr. Markley cannot step on the pier today in pursuance of his duties as a security officer?"

"Question: Mr. Murphy, did you in August, 1960, tell the Executive Vice President of the American Export Line that if Mr. Markley stepped on the piers there would be a walkout?"

"Question: In the event that Mr. Markley walked on the piers of Hoboken, New Jersey, today on the American Export Lines would you order the membership of the ILA present there off the piers?"

John Moody, Sr., gave his name and address. Mr. Moody, Sr., however, refused to answer the following questions:

"Question: Are you an official of the International Longshoremen's Association Independent or the International Longshoremen's Association which is affiliated with the AFL-CIO?"

"Question: Mr. Moody, I direct your attention to a work stoppage that occured on Monday, May 16, 1960, at Piers A, B, and C, Hoboken, the American Export Lines Terminal. Did you have any prior knowledge that that work stoppage was to take place on Monday, May 16, 1960, at (22) that terminal?"

"Question: Mr. Moody, would you tell the Commission the source of the knowledge that you had concerning the work stoppage at Piers A, B, and C, Hoboken, in May, 1960?"

"Question: Mr. Moody, did you at any time prior to May 16, 1960, give orders to any longshoremen, shop stewards, or others to commence a work stoppage on Monday, May 16, 1960, because of the presence of one James Markley on the piers as security officer?"

"Question: Mr. Moody, did you have any conversations with any other union official of the International Longshoremen's Association prior to May 16, 1960, about calling a strike concerning James Markley's presence on the Hoboken Terminal as a security officer?"

"Question: Did you have a conversation about calling a strike during the week of May 16, 1960, with one Mr. Gleason of the ILA?"

"Question: On the 17th of May, 1960, were you present on the terminal in Hoboken, which is called the American Export Lines Terminal? Were you present?"

"Question: Did you on that date, May 17, (23) 1960, tell the shop stewards, Frank Rump, Carmine Bruno, Eric Lumpke, to call the longshoremen out on strike because of Mr. Markley on the piers as a security officer?"

"Question: Did you attend a meeting on May 17, 1960, at the offices of the American Export Lines at the Hoboken Terminal? Did you attend such a meeting?"

"Question: Did you at that meeting state to Leland Andrews, another official of the American Export Lines, who attended the meeting, if Markley walks on the piers there would be a work stoppage?"

"Question: Did you either before May 16, 1960, or during the week of May 16, 1960, speak to Michael McNamara concerning a work stoppage at the American Export Lines Terminal over the presence of Mr. Markley at the piers?"

"Question: Prior to May 16, 1960, or during the week of May 16, 1960, did you have a conversation with Michael McNamara concerning a work stoppage to be called on May 16, 1960, over the presence of James Markley on the Hoboken Terminal as a security officer?"

"Question: Do you know Mr. William Murphy?"

(24) "Question: Do you see Mr. Murphy sitting in this room?"

"Question: Do you know Leland Andrews, Mr. Moody?"

"Question: Do you know Mr. Lyle Bull, Executive Vice President of the American Export Lines?"

"Question: Did you at any time, either in Hudson County, in the State of New Jersey, or in the County of

New York in the State of New York, have any discussion with any executives of the American Export Lines, concerning Mr. Markley's employment with that shipping company?"

"Question: Do you know whether Mr. Markley has ever been on the piers in the performance of his duties as security officer of the American Export Lines since his employment in May of 1960?"

The respondents were directed by the designees of the Waterfront Commissioners to answer these questions. The defendants, or respondents, were told they were granted immunity as to their testimony.

The defendants refused to answer any of the above questions in spite of the direction to (25) answer by the said designees and the promise of immunity, and based their refusal on the grounds that the Commission failed to set forth fully the purposes of the investigation, a failure of due process, and they further invoked the privilege of self incrimination.

The Waterfront Commission now seeks to have the defendants adjudged guilty of contempt of court, civil and criminal, for their failure to answer the questions set out after they had been granted immunity from prosecution by the Commission.

In opposition, the defendants claim the purported grant of immunity is invalid because the Commission failed to comply with the statute which grants immunity, N. J. S. A. 32:23-86(5) in that proper notice was not sent to the various law officers of the two states, in that the grant of immunity was not explicit as to each question and, further, in that it was improper for the designees of the Commissioners of the Waterfront Commission to grant this immunity. The defendants further maintain that they were denied due process in that the Commission failed to disclose any damaging information it had and (26) further failed to produce accusatory witnesses.

The defendants, or respondents, rely strongly on N. J. S. A. 84 A, Rules of Evidence, and contend that Rule 24 of that section, N. J. S. A. 2A:84 A-18, extends the definition of incrimination to crimes against the United States and other states and that Rule 25 of that section wherein is provided "Subject to Rule 37, every natural person has a right to refuse to disclose in an action or to a police officer or other official any matter that will incriminate him or expose him to a penalty or a forfeiture of his estate" thereby provides a privilege of self-incrimination which includes federal incrimination as well as state incrimination. This is one of the contentions of these witnesses, or defendants.

The defendants contend that since the purported immunity granted by the Commission does not apply to immunity from federal incrimination, it is not coextensive with the privilege against self-incrimination invoked and is, therefore, unconstitutional.

The defendants further maintain that they have reasonable cause to apprehend a criminal (27) prosecution and set out numerous federal statutes it may be claimed they violated.

The defendants claim a failure of due process of law in that they were not properly apprised of the subject matter of the investigation, as I have previously stated.

The Waterfront Commission Act was passed by the State of New Jersey in 1953 (R. S. 32:23-1 etc.).

Some of the general powers of the Commission are as follows:

"Article IV.

"In addition to the powers and duties elsewhere prescribed in this compact, the Commission shall have the power

"8. By its members and its properly designated officers, agents and employees to administer oaths and issue subpoenas throughout both states to compel the attendance of witnesses and the giving of testimony and the production of other evidence.

"11. To make investigations, collect and compile information concerning waterfront practices generally within the Port of New York District and upon all matters relating to (28) the accomplishment of the objectives of this Compact.

"13. To make annual and other reports to the governors and legislatures of both states containing recommendations for the improvement of the conditions of waterfront labor within the Port of New York District, for the alleviation of the evils described in Article I and for the effectuation of the purposes of this Compact." (Waterfront Commission Act, Part 7, Article IV, Sections 8, 11, 13, N. J. R. S. 32:23-10.)

"Witness shall mean any person whose testimony is desired in any investigation, interview or other proceeding conducted by the Commission pursuant to the provisions of this Act." N. J. R. S. 32:23-85.

N. J. R. S. 32:23-86 provides:

"In addition to the powers and duties elsewhere prescribed in this Compact, the Commission shall have the power

"To confer immunity in the following manner: In any investigation, interview or other proceeding conducted under oath by the Commission or any duly authorized officer, (29) employee or agent thereof, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and notwithstanding such refusal, an order is made upon twenty-four hours' prior written notice to the appropriate attorney general of the State of New York or the State of New Jersey, and to the appropriate district attorney or prosecutor having an official interest therein, by the unanimous vote of both members of the Commission or their designees appointed pursuant to the provisions of section three of article III of this Act, that such person answer the questions or produce the evidence, such person shall comply with the order. If such person complies with the order and if but for this subdivision he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him as provided for herein.

"Immunity as used in this subdivision means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or (30) thing concerning which, in accordance with the order of the unanimous vote of both members of the Commission or their designees appointed pursuant to the provisions of section three of Article III of this Act, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer or in producing or failing to produce evidence in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt.

"Immunity shall not be conferred upon any person except in accordance with the provisions of this subdivision. If after compliance with the provisions of this subdivision, a person is ordered to answer a question or produce evidence of any other kind and complies with such order, and it is thereafter determined that the appropriate attorney general or district attorney or prosecutor having an official interest therein (31) was not notified, such failure or neglect shall not deprive such person of any immunity properly conferred upon him."

N. J. R. S. 32:23-9 provides:

"The Commission shall act only by unanimous vote of both members thereof. Any member may, by written instrument filed in the office of the Commission, designate any officer or employee of the Commission to act in his place as a member whenever he shall be unable to attend a meeting of the Commission. A vacancy in the office of a member shall not impair such designation until the vacancy shall have been filled."

Chief Justice Weintraub, in *Department of Health, State of New Jersey, versus Peter Roselle,* N. J. , a case decided on March 20, 1961, in the Supreme Court of New Jersey, sets forth the history of contempt actions and describes and defines both civil and criminal contempt. He said, among other things:

> "If the order is mandatory and the violator has the ability to perform, the Court will ordinarily jail the offender until he complies. If the order is prohibitory, again the offender (32) may be incarcerated until he undoes the violation if he has the ability to undo it."

The present proceeding is both criminal and civil.

In the above cited case, Judge Weintraub said:

> "Yet the object of the proceedings is of great moment for if it is criminal, he is entitled to the safeguards accorded one charged with crime, except the constitutional guarantee of the indictment and trial by jury, and even as to them, we note in passing that a vigorous dissent in *Green versus United States,* 356 U. S. 165, 2 L. Rev. 672, 1958, finds those rights are assured. See Comment, 57 Michigan Law Review, 258, 1958."

N. J. S. 2A:10-1 deals with the power of the courts "to punish for contempt."

The contempt process is severe because of its summary nature and the many different parts a court plays in the proceeding. Naturally, the power should be used cautiously and sparingly.

I find that the designations authorizing Myles J. Ambrose to act in the place of Commissioner Harold Tyler, Jr., to confer immunity upon William Murphy and John Moody, Sr., which (33) designations were introduced into evidence by the Waterfront Commission at the investigation of October 27, 1961, before mentioned, and the designations authorizing William P. Sirignano to act in the place of Commissioner David C. Thompson to confer immunity upon William Murphy and John Moody, Sr., at the same investigation are valid and comply with the requirements of N. J. R. S. 32:29-9 above.

I further find that the letter to Lawrence A. Whipple, Prosecutor of Hudson County, New Jersey, dated October 10, 1961, and the letter to David D. Furman, Attorney General of New Jersey, along with the letter dated October 23, 1961, to Frank Hogan, District Attorney for New York County, New York, and the letter dated October 24, 1961, to Louis Lefkowitz, Attorney General for New York, which letters were introduced into evidence at the said investigation of October 27, 1961, meet the requirements for notice set out in N. J. R. S. 32:23-86 and are sufficient for the purpose therein expressed.

I find that the explanation of the doctrine and statutory provision of immunity, as expressed by Mr. Piazzi and Mr. Sirignano of the Waterfront (34) Commission on pages 58, 59, 60, etc., of the transcript of the investigation relating to William Murphy on October 27, 1961, which is incorporated into the investigation of that date concerning John Moody, Sr., by the statements of parties expressed on page 1 of the transcript of that investigation, which is further explained on pages 8 and 9 of said transcript, adequately and properly apprised the defendants of the offered grant of immunity whenever the privilege of self incrimination is invoked and the defendants were directed by the designees of the Commissioners to answer the questions.

The transcripts of the investigations conducted May 19, 1960, October 3, 1961, and October 27, 1961, are replete with explanations as to the subject matter of the investigation. The opinion of the Supreme Court of New Jersey confirming this Court's judgment of contempt against Murphy and Moody sets forth at length the subject matter of the Commission's investigation. The Jurisdictional Statement filed in the Supreme Court of the United States further shows the defendants' familiarity with the (35) subject matter of the Commission's investigation.

I now turn to a consideration of the defendants' contention as advanced in their supplemental and reply brief that the grant of immunity offered by the Waterfront Commission is unconstitutional in that it is not co-extensive with the privilege against self-incrimination invoked. Defendants argue that N. J. R. S. 84 A-1, etc., does not extend the privilege against self-incrimination to a protection against federal incrimination.

It is acknowledged that the grant of immunity offered by the Waterfront Commission did not extend to protection against federal incrimination.

This Court, in a consideration of Chapter 84 A, Rules of Evidence, notes that Rule 2, N. J. R. S. 2A:84 A-16, Scope of Rules, provides in section 4 as follows:

"The enactment of the rules set forth in this act or the adoptions pursuant hereto *shall not operate to repeal any statute by implication*." Underlining by the Court.

Rule 25, N. J. R. S. 2A:84 A-19, Self Incrimination; Exceptions, provides as follows:

(36) "Subject to Rule 37, every natural person has a right to refuse to disclose in an action or to a police officer

or other official any matter that will incriminate him or expose him to a penalty or a forfeiture of his estate, except that under this rule.

"(c) *No person has a privilege to refuse to disclose any matter which the statutes or regulations governing his office, activity, occupation, profession or calling*, or governing the corporation or association of which he is an officer, agent or employee, *require him to record, or report or disclose*, except to the extent that such statute or regulations provide that the matter to be recorded, reported, or disclosed shall be privileged or confidential." Underlining by the Court.

N. J. R. S. 2A:84 A-40, Effect of Rules on Conflicting Laws, provides:

"All previous laws or parts of laws dealing with the admission or rejection of evidence *which shall be expressly identified by footnotes to any rule so adopted* and which shall be in conflict or inconsistent with such rule or rules or included therein, revised or rendered obsolete (37) thereby shall be of no further force or effect after such rule or rules shall have taken effect." Underlining by the Court.

The "Repeals" provision of the statute referred to provides:

"The following acts and parts of acts and all amendments and supplements thereto are hereby repealed: Sections 2A:81-3, 2A:81-5, 2A:81-7, 2A:81-9 and 2A:81-10 of Title 2A of the New Jersey Statutes."

The underlining of all of the foregoing, of course, is supplied by the Court.

As can be seen from the quoted sections, the new Rules of Evidence (N. J. R. S. 2A:84 A-17, etc.) do not operate to repeal any statutes by implication. (2A:84 A-16.)

Previous laws identified by footnotes are to be affected by the new rules. (2A:84 A-40.) The particular section of the New Jersey statutes affected is 2A:81-3, etc.

The Waterfront Commission Act is not affected by these new rules. It is not repealed by implication. It constitutes a statute governing and regulating the waterfront and as such is provided for by 2A:84-19(c), wherein is (38) stated:

> "No person has a privilege to refuse to disclose any matter which the statutes or regulations governing his office, activity, occupation * * * require him to disclose."

One of the main arguments advanced by the defendants is that the immunity must be coextensive with the privilege. New Jersey could never grant federal immunity as the Legislature has no power so to do. If this contention is correct, then the State could never grant immunity. It is not essential that for the purpose of conferring immunity federal immunity must also be conferred.

Rule 24 of the Rules of Evidence expressly provides that those rules do not operate to repeal any statutes by implication.

> "The enactment of the rules set forth in this Act or the adoption of rules pursuant hereto shall not operate to repeal any statutes by implication." (R. S. 2A:84 A-16(4).)

It is to be further noted that in the report of the Legislative Commission to study the improvement of the law of Evidence, page 15, 1956, it states:

(39) "This paragraph has the effect of continuing all existing statutes. This Commission feels that it is necessary to review the New Jersey Statutes in detail and to specifically treat each such statute dealing with evidence. Otherwise, a wholesale repeal of many statutes, without consideration of all the implications, would result."

Our Supreme Court referred to this report interpreting the rules of evidence. *Nussbaum versus Newark Morning Ledger Company,* 33 N. J. 419, 424 (1960).

Thus it is seen that the privilege against self-incrimination which the defendants are relegated to invoke by the statutory law of New Jersey deal only with a privilege against incrimination dealing with the state. By virtue of the Waterfront Compact this is extended to New York, which has passed the Waterfront Commission Act. (N. Y. Law 1953, 882.)

In the case of the *State of New Jersey versus Francis Murphy,* et al, decided in the last few weeks, in an opinion by Chief Justice Weintraub, he said:

> "In short, the States did not create a (40) governmental authority and cut the umbilical cord, if, indeed, constitutionally they could. As the agent of each state, the Commission is subject to all of its laws, whether of statutory or common law origin, excepting insofar as the States agreed expressly or by fair implication to place it beyond them."

I find the grant of immunity offered to the defendants under N. J. R. S. 32:23-86 is co-extensive with the privilege against self-incrimination which they may invoke.

The fact that the immunity granted does not extend to immunity from federal prosecution does not affect the constitutionality of the statute granting immunity.

See *Feldman versus United States,* 322 U. S. 487, 491, citing *Jack versus Kansas,* 199 U. S. 372, 380, wherein it is stated:

"This court (U. S. Supreme Court) has held that immunity against state prosecution is not essential to the validity of federal statutes declaring that a witness shall not be excused from giving evidence on the ground that it will incriminate him, and also that the lack of state power to give witnesses protection against (41) federal prosecution does not defeat a state immunity statute * * *"

See *Knapp versus Schweitzer, Judge of the Court of General Sessions,* et al, 357 U. S. 371.

The respondents and witnesses, Murphy and Moody, have taken the stand in an attempt to pinpoint the federal criminal involvement which they fear.

See *In re Boiardo,* 34 New Jersey 599 (1961).

It is incumbent upon these witnesses to show that there is a reasonable basis for such fear of criminal involvement. This testimony is difficult to believe in the light of the respondent Murphy's statement to his attorney, Mr. Wall. See Exhibit C to the Commission's motion herein, page 30a, where he contended that a labor dispute existed cognizable by the National Labor Relations Board and this negatives the possibility of the work stoppage involved being a part of a conspiracy to commit theft from Interstate Commerce or extort money or otherwise involve a violation of the Federal Criminal Code.

See pages 7, 8, 9, 10, and 11 of the Commission's reply brief.

(42) All briefs, including the one just mentioned, are, of course, in evidence.

It is to be noted that the Waterfront Act was passed primarily to eliminate criminal domination of waterfront labor, that its passage followed extensive study of waterfront conditions by New York, New Jersey, and Congress. Its provisions must be interpreted in the light of its extensive legislative history. Its provisions are to be given effect.

The interpretation these witnesses would have the Court give to its provisions as to the compelling of attendance and testimony of witnesses by subpoena and the granting of immunity from self-incrimination would render it useless and powerless to effectuate the purposes for which it was designed.

For the reasons above stated the Court is constrained to find both Messrs. Murphy and Moody guilty of contempt, civil and criminal, this being both civil and criminal contempt.

The defendant's motions which the Court has before it for consideration, naturally, will be denied. Those motions were motions directed to the discretion of the Court. However, the (43) disposition of the matter on its merits finally disposed of them, but even in the exercise of discretion, none of those motions would be granted by this Court. So all the other motions are respectfully denied.

The Court will defer the imposition of sentence of these defendants for one week from today in order to secure a pre-sentence report from the Probation Department, and I will request that counsel arrange to be here one week from today at 9:30, with the defendants present, of course.

Mr. Krieger: May I, for the record—I understand your Honor is not fixing a trial on either the civil or criminal contempt and makes a finding on these issues without trial?

The Court: Yes.

Mr. Krieger: Are we excused now?

The Court: Yes.

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APPENDIX C

Opinion of Supreme Court of New Jersey in Prior Contempt Proceeding

SUPREME COURT OF NEW JERSEY

A-78 September Term 1960.

IN THE MATTER

OF

THE APPLICATION OF THE WATERFRONT COMMISSION OF NEW YORK HARBOR, to punish WILLIAM MURPHY for failure to obey a Subpoena.

IN THE MATTER

OF

THE APPLICATION OF THE WATERFRONT COMMISSION OF NEW YORK HARBOR, to punish JOHN MOODY, SR. for failure to obey a Subpoena.

Argued April 11, 1961

Decided May 22, 1961

Mr. Robert Wall argued the cause for the Appellant, William Murphy.

Mr. Samuel L. Marciano argued the cause for the Appellant, John Moody, Sr. (Messrs. Florio, Dunn, Marciano & Lypinski, Attorneys; Mr. Samuel L. Marciano, on the Brief.)

Mr. Robert A. Pin argued the cause for the Respondent, Waterfront Commission of New York Harbor. (Mr. William P. Sirignano, of the New York Bar, General Counsel; Mr. Irving Malchman, of the New York Bar, Assistant to General Counsel.)

The opinion of the court was delivered by

PROCTOR, J.

This case turns on whether the Waterfront Commission of New York Harbor has jurisdiction to investigate a work stoppage by longshoremen, when the Commissioners have reason to believe that the stoppage was designed to inhibit effective operation of the port watchman system. The defendants, John Moody, Sr. and William Murphy—officials of the striking union—appeal from a judgment of the Superior Court, Law Division, ordering that they be incarcerated until they are willing to answer certain questions addressed to them by the Commission during the course of its investigation. Each was also fined $50. We certified the appeal before argument in the Appellate Division.

The events leading up to the judgment from which defendants appeal are as follows: One James H. Markley was an investigator for the Commission, assigned principally to cover the piers and terminal of the American Export Lines in Hoboken. On or about May 16, 1960, Markley left the employ of the Waterfront Commission in order to work for American Export as a security officer. To fulfill his security functions, Markley obtained a license from the Commission permitting him to operate as a port watchman. On May 16, 1960, the day Markley was to commence work for American Export, the longshoremen and checkers employed by American Export in Hoboken did not report for work. With the exception of the morning of May 17, the work stoppage continued until May 25. The striking employees were members of Hoboken Local #2 of the International Longshoremen's Association (ILA). Defendant Moody is an organizer for the ILA in New Jersey; and defendant Murphy is business agent for Local #2.

The Waterfront Commission had information that the work stoppage was "a concerted effort to keep James H. Markley off the piers of the American Export Lines." Accordingly, it instituted an investigation to determine whether any persons registered or licensed by the Commission were violating the Waterfront Commission Act (N.J.S.A. 32:23-1 *et seq.*) by coercing an employer to limit the functions of, or discharge a licensed port watchman. In connection with the investigation, the Commission served subpoenas ordering the defendants to appear and testify. When defendants appeared, they were informed of the above-described purposes of the investigation. They were also informed that the Commission was proceeding under its statutory authority to make investigations and collect and compile information concerning waterfront practices generally, and all matters relating to the accomplishment of the objectives of the Act. The defendants were also told that the Commission was "asking questions to determine the true nature of this work stoppage, to see whether it's a labor dispute or whether there's violation of both the criminal law or the * * * [Waterfront Commission Act]."

Defendant Moody gave his name and address, testified that he was a union official, and refused to answer any other questions. Defendant Murphy testified that he was business agent of Local #2 and represented members of the Local working at the American Export facilities in Hoboken. He stated that he knew the longshoremen did not work on May 16, 1960, and that it was common knowledge for the ten days preceding May 16 that things were not normal at the American Export piers. Murphy refused to say whether the abnormal conditions were related to the employment of Markley as port watchman, and he refused to answer any other questions. Neither defendant asserted his privilege against self-incrimination; but each stated, *inter alia,* as a reason for his refusal to answer that the Commission did not have jurisdiction to conduct the investigation.[1] The Commission interrogator overruled the defendants' objections to the questions, directed them to answer, and informed them that continued recalcitrance would subject them to "contempt proceedings." Defendants persisted in their refusal; and subsequently the Law Division, pursuant to a motion by the Commission, and after a hearing, rendered the judgment which imposed a fine upon the defendants and directed their incarceration.

Defendants urge reversal of the judgment below on the ground that, even assuming the purpose of the work stoppage was to subvert the port watchman system, the Commission does not have jurisdiction to investigate it. They argue (1) that the investigation adversely affects or limits "the right to strike" which is expressly reserved by the Waterfront Commission Act (N.J.S.A. 32:23-68); and (2) that the Commission's power to investigate is in conflict with and therefore pre-empted by the Labor Management Relations Act (LMRA) (29 U.S.C.A. § 141 *et seq.*). Defendants' first argument is encompassed by their pre-emption argument. Article XV, section 1, par. 1 of the Waterfront Commission Act provides:

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[1] Defendants' other stated reasons for their refusals to answer are not related to the grounds for reversal urged on this appeal.

> "* * * nothing contained in this compact shall be construed to limit in any way the right of employees to strike." N.J.S.A. 32:23-68.

Assuming, *arguendo,* that investigation and the concomitant power to punish recalcitrant witnesses is in itself regulation, the effect of this statutory provision upon the Commission's power to investigate necessarily depends upon what is meant by the "right to strike." Like most rights, that right is not absolute. A strike is not immune under all conditions from any form of governmental regulation. The waterfront Act does not purport to define the dimensions of the right to strike. It therefore merely declares a rule of interpretation which prevents any use of the Act to qualify or impede whatever right exists under New Jersey or Federal law. *Cf International Union v. Wisconsin Empl. Rel. Bd.,* 336 U. S. 245, 259, 93 L. Ed. 651, 665 (1948) (interpreting § 163 of the LMRA, which provides that "Nothing in this subchapter * * * shall be construed so as either to interfere with or impede or diminish in any way the right to strike * * * " 29 U.S.C.A. §163.) We do not know of any New Jersey law which prevents state investigation of a strike intended to inhibit effective functioning of a security system. If that right exists, it must come from federal law. The applicable federal law is the LMRA and its amendments. By the "right to strike," therefore, defendants must mean that under the federal statute the alleged union activity is either immune from limitation or subject to limitation only by the federal government. So viewed, the argument is that because the work stoppage falls within the purview of the LMRA, the National Labor Relations Board has exclusive primary jurisdiction to deal with it. This is the same as defendants' pre-emption argument and shall be discussed together therewith.

Defendants' pre-emption argument goes as follows: The power to investigate is the power to regulate. A state may regulate union activity only when the activity is clearly not protected by § 7 or prohibited by § 8 of the LMRA. 29 U.S.C.A. §§ 157, 158. Otherwise stated, if union activity is arguably protected or prohibited by the federal legislation, the National Labor Relations Board has exclusive primary jurisdiction to deal with it. See *San Diego Bldg. Trades Council* v. *Garmon*, 359 U. S. 236, 3 L. Ed. 2d 775 (1959). The Waterfront Commission states that the purpose of its investigation is to determine whether defendants' union struck to cause an employer (American Export) to discriminate against one of its employees (Markley). Defendants contend that such a strike is an unfair labor practice under section 8(b)(2) of the LMRA (29 U.S.C.A. § 158(b)(2)). Accordingly, the Waterfront Commission has no primary jurisdiction to investigate it.

For reasons subsequently to be discussed, it is unnecessary for us to decide whether the strike by defendants' union arguably fails within the protections or proscriptions of the LMRA. The constitutional doctrine of preemption—the exclusion of state power over a particular matter because it is the subject of comprehensive federal regulation—is designed to implement congressional purpose. See *De Veau* v. *Braisted,* 363 U. S. 144, 153, 4 L. Ed. 2d 1109, 1116 (1960); *Garner* v. *Teamsters, C. & H. Union,* 346 U. S. 485, 488, 98 L. Ed. 228, 238 (1953). If by its regulation of a particular activity Congress has exhibited a purpose which is incompatible with the exercise of state power over the same activity, the state power must give way. *San Diego Bldg. Trades Council* v. *Garmon, supra; Garner* v. *Teamsters, C. & H. Union, supra.* The applicability of the doctrine to the present case therefore depends upon an answer to the question: Would Congress regard a Commission investigation of a strike designed to limit the effectiveness of the port-watchman system as incompatible or in conflict with federal regulation of labor relations?

The answer to the above question turns on the nature of the Waterfront Commission Act. Our Act is a counterpart of one contemporaneously adopted by New York. L. 1953, cc. 202, 203, N.J.S.A. 32:23-1 *et seq.*; N. Y. Laws 1953, cc. 882, 883, *McKinney's Unconsolidated Laws,* §§ 6700aa *et seq.* It has three parts. Part *I N.J.S.A.* 32:23-1 to 73) is a compact of sixteen articles entered into by the two states with the consent of Congress (67 Stat. 541, Act of Aug. 12, 1953, c. 407) as required by Article *I,* section 10 of the Federal Constitution. This part establishes the Waterfront Commission as a bi-state agency, sets forth the purposes of the legislation, and gives to the Commission certain powers essential to fulfillment of those purposes. Part *II* N.J.S.A. 32:23-74 to 77.3) primarily concerns the financial administration of the Commission and its programs. And Part *III* (N.J.S.A. 32:23-78 to 108) contains provisions supplementing and implementing the compact of Part *I*.

A recent United States Supreme Court case relies on congressional approval of the bi-state Compact to show that the congressional purpose manifested in federal labor legislation is not incompatible with the exercise of a state power asserted under the Waterfront Act. *De Veau* v. *Braisted*, 368 U. S. 144, 4 L. Ed. 2d 1109 (1960), At issue in *De Veau* was the validity of a provision in Part III of the New York Act (New Jersey's Act has a similar provision) which prohibits a waterfront union from collecting dues if any officer of the union has been convicted of a felony and has not been pardoned or given a certificate of good conduct by the parole Board. *McKinney's Unconsolidated Laws* § 6700-ww; (N.J.S.A. 32:23-80). The plaintiff, a local union official who had been convicted of grand larceny, was suspended from office because the defendant district attorney threatened to prosecute any person collecting dues for the local so long as the plaintiff remained an officer. The plaintiff sought to have the statutory provision declared unconstitutional and its operation enjoined. His primary argument was that the disputed section of the Waterfront Act was in conflict with and therefore pre-empted by the LMRA, specifically sections 1 and 7 thereof. 29 U.S.C.A. §§ 151, 157. Section 1 of the LMRA declares a congressional purpose to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C.A. § 151. Section 7 grants employees "the right * * * to bargain collectively through representatives of their own choosing." 29 U.S.C.A. § 157. The plaintiff argued that pre-emption resulted from the fact that the employees' right to select representatives of their own choosing guaranteed by the LMRA was interfered with or limited by the Waterfront Act provision disabling them from collecting dues if they select a convicted felon as a representative.

The court rejected the pre-emption argument on the ground that "in light of the purpose, scope and background of * * * [the Waterfront Commission Act] and Congress' relation to it, * * * an inference of incompatibility has no foundation." 363 U. S. at 153, 4 L. Ed. 2d at 1116. It noted that the Waterfront Act was passed primarily to eliminate criminal domination of waterfront labor; that its passage followed extensive study of waterfront conditions by New York, New Jersey and Congress; and that Congress concurred in the states' conclusion that statutory measures to control waterfront labor practices were essential to eliminate the then prevailing crime-infested conditions. The court reasoned that by approving the bi-state Compact and thus endorsing its goals, Congress manifested an intent not to pre-empt regulation of union officials by the Waterfront Commission.[2]

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[2] The plaintiff in *De Veau* also argued that pre-emption derived from a provision of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C.A. § 401 *et seq.*, which imposed less restrictive limitations on union officers than the Waterfront Act. The court rejected that argument on the ground that when Congress meant pre-emption to flow from the 1959 Act, it expressly so provided.

The principle of *De Veau*—that congressional approval of the bi-state Compact indicates the inapplicability of the pre-emption doctrine to a state power derived from the Waterfront Act—applies with even more force to the case before us. For in *De Veau* the disputed section of the Waterfront Act was not part of the Compact expressly consented to by Congress.[3] An examination of the history and structure of the Waterfront Act shows that the power here asserted by the state is not only essential to fulfillment of the statutory objectives but is accorded by the Compact which Congress approved.

As previously noted, submission of the Compact to Congress was preceded by extensive studies, undertaken by the states and Congress, of conditions on the New York-New Jersey waterfront. For a discussion of these studies, see *Hazelton* v. *Murray,* 21 N. J. 115 (1956) and state and congressional reports cited therein.

The legislative reports all indicate that the Act was passed to eliminate racketeering and other evils on the New York-New Jersey waterfront. One evil of specific concern was the domination of the Port Watchmen's union by the ILA. Criminal elements in control of the ILA were thus able to neutralize the effectiveness of the security system, and commit crimes without fear of disclosure. "Through their power as union officials, they [criminal leaders of the ILA] place their confederates in key positions on the docks * * * and carry on such activities as pilferage, loansharking and gambling." *Fourth Report, N. Y. State Crime Commission, N. Y. State Leg. Doc. No. 70,* pp. 23-24 (1953). The extent and effect of former ILA control over watchmen is illustrated by the following excerpts from pages 57, 59, and 63 of the New York report adopted by the New Jersey Law Enforcement Council (*Report of the New Jersey Law Enforcement Council,* p. 3, June 19, 1953):

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[3] As previously noted, the disputed section was contained in Part *III*. Parts *II* and *III* were not part of the Compact. The Supreme Court reasoned, however, that since Congress was aware of the provisions in Part *III* when it approved Part *I*, and since Part *III* was essential to implementation of Part *I*, congressional approval extended to the disputed section.

> "Prior to the Taft-Hartley Act (1947) the Port Watchmen's Union, Local 1456, which represented the New York port watchmen, was an ILA local dominated and controlled by Joseph P. Ryan, John J. (Ike) Gannon, Charles P. Spencer, and their associates. Since the port watchmen were supposed to stop thievery, loansharking, gambling and extortion, and to preserve the peace, they could hardly expect—and did not receive—any support from the officials of the ILA or of its locals.
>
> * * *
>
> "The close connection of the watchmen's union with the ILA has resulted in watchmen being reprimanded by their union leaders for reporting a longshoreman for stealing. This situation was developed in the testimony of C. Gulizia, a port watchman (3168-3169);
>
> Q. And did you have occasion during that time to pick up a longshoreman for stealing cargo on that pier? A. Right, sir.
>
> * * *
>
> Q. Turned the man in? To whom? A. To the superintendent, of course. The man, I hear, got four days

suspension. The man went to the union and complained about it.

Q. And he came back to work? A. Well, he didn't come back. Maybe he went to another pier.

Q. But he got a four-day suspension? A. As far as I was told.

Q. He wasn't prosecuted criminally, so far as you know? A. Never.

Q. He wasn't sentenced to jail for larceny, anything of that kind? A. Never. None of them were sent to jail.

• • •

Q. And what did Gannon say about it? A. Well, he says, 'That isn't the right way to do things,' and he says, Gannon says, 'If you were to get four days' suspension, how would you like it?'

Q. You mean the president of the Watchmen's Union? A. That's right.

Q. Told you it wasn't right to turn in a man you'd seen actually stealing cargo on the pier? A. That's right. That's right.

The port watchman, next to the rank-an-file longshoreman, is the most tragic figure on the piers.

• • •

"When some steamship companies have attempted to increase the effectiveness of their security service they have been met with objections on the part of ILA officials and forced to give up the project. An example was given by F. M. Rohrer of the Grace Line. Rohrer explained what happened when he tried to hire Vincent Tierney to head the Grace Line port police (371):

> Q. Did you then tell Mr. Tierney that you had to clear the hiring of Mr. Tierney to replace Mr. English with Gene Sampson, the delegate of 791, and Jay O'Connor, the delegate of 791, and others? A. I don't know as it was mentioned by name, but I probably did tell him that it had to be cleared through the union.
>
> Q. That the hiring of the head watchman had to be cleared— A. (interposing) With the union delegates.
>
> Q. ILA union delegate? A. That's right.
>
> Q. Not the watchmen's delegates? A. No.
>
> "Tierney was then employed to make a security study on the piers operated by the Grace Line, but even this met with violent union opposition. In fact, Tierney, an ex-policeman, testified that he had been threatened with death (3889)."

To combat the above-enumerated and other evils, the Compact (the part of the Act approved by Congress) grants to the Waterfront Commission authority to license or register waterfront workers and to regulate hiring practices. Of particular significance to the present case is the fact that the Compact requires port watchmen to be licensed by the Commission (N.J.S.A. 32:23-39) and establishes as a condition for receiving and holding a license that a watchman not be a member of a union which represents longshoremen. N.J.S.A. 32-23-41(d) and 44(a). To make effective the provisions of the Act, the Compact grants the Commission the powers, among others, (1) "*to make investigations*, collect and compile information *concerning* waterfront practices generally within the port of New York district and upon *all matters relating to the ac-*

complishment of the objectives of this compact." N.J.S.A. 32:23-10(11) [Emphasis added]; (2) "to administer oaths *and issue subpoenas throughout both States to compel the attendance of witnesses and the giving of testimony* and the production of other evidence." N.J.S.A. 32:23-10(8) [Emphasis added]; and (3) "to make annual and other reports to the Governors and Legislatures of both States containing recommendations for the improvement of the conditions of watedfront labor * * * for the alleviation of the evils described * * * and for the effectuation of the purposes of this compact." N.J.S.A. 32:23-10(13). N.J.S.A. 32:23-62, also contained in the Compact approved by Congress, provides that failure of any witness when duly subpoenaed to attend or give testimony shall be punishable by the Superior Court, Law Division, in New Jersey, and the Supreme Court in New York in the same manner as such failure is punishable by those courts in a case pending therein. See *In re Application of Waterfront Com.*, 32 N. J. 323, 332 (1960).

It is clear from a reading of the legislative reports which preceded passage of the Waterfront Act and a reading of the Compact itself that the creation and maintenance of an independent port watchman system was regarded by both the States and Congress as essential to the creation and preservation of a crime-free waterfront. It is equally clear that power to investigate any activity which reasonably appears designed to inhibit the effectiveness of the port security system is essential to the maintenance of the watchman's independence and thus to the fulfillment of the ultimate statutory goal. We can think of no sensible reason why Congress would expressly approve the States' effort to rid the waterfront of crime by creating, among other things, an independent watchman system, and yet pre-empt and thus bar application of the expressly granted power to investigate activities which appear detrimental to accomplishment of that goal. *Cf. De Veau* v. *Braisted, supra,* 363 U. S. at 153, 4 L. Ed. 2d 1109 at 1116.

Applying the principle of *De Veau* to the case before us; we find that by its express approval of the bi-state Compact Congress indicated that exercise of the Commission's investigatory power over a strike which appears designed adversely to affect the port security system does not conflict with the policies and goals of federal labor legislation and that therefore the States' power is not pre-empted by the LMRA.[4] We note that our conclusion is consistent with all other cases we know of in which some provision of the Waterfront Act was alleged to have been pre-empted by federal legislation. In each case the Act survived the pre-emption attack. *Staten Island Loaders* v. *Waterfront Commission,* 117 F. Supp. 308 (S. D. N. Y. 1953) *aff'd* 347 U. S. 439, 98 L. Ed. 826 (1954); *Linehan* v. *Waterfront Commission of New York Harbor,* 116 F. Supp. 683 (S. D. N. Y. 1953), *aff'd* 347 U. S. 439, 98 L. Ed. 826 (1954); *Bell* v. *Waterfront Commission of New York Harbor,* 279 F.

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[4] The defendants do not urge a conflict between the Commission's power to investigate this strike and any provision of the Labor-Management Reporting and Disclosure Act of 1959. 29 U.S.C.A. § 401 *et seq.*

2d 853 (2d Cir. 1960); *Bradley* v. *Waterfront Com'n of New York Harbor,* 130 F. Supp. 303 (S. D. N. Y. 1955); *O'Rourke* v. *Waterfront Commission,* 118 F. Supp. 236 (S. D. N. Y. 1954); *Applegate* v. *Waterfront Com'n of New York Harbor,* 184 F. Supp. 33 (S. D. N. Y. 1960); *Habelton* v. *Murray, supra.*

We hold that the Commission may investigate a waterfront work stoppage when the Commissioners have reason to believe that the stoppage is designed to inhibit effective operation of the Act. The Commission is entitled to know all of the facts surrounding such a stoppage so that it may intelligently determine whether persons registered or licensed by the Commission have violated any provision of the Act and so that it may fulfill its statutory duty of recommending to the state governments measures for the improvement of the conditions on the New York-New Jersey waterfront.

Accordingly, the judgment of the Supreme Court, Law Division, is affirmed.

APPENDIX D

Opinion of Superior Court of New Jersey, Law Division, Hudson County, in Prior Contempt Proceedings

Jersey City, N. J.
June 17, 1960.

Before:

Hon. Joseph L. Smith, *J. S. C.*

Appearances:

For the Waterfront Commission of New York Harbor:
Robert A. Pin, Esq.

For William Murphy:
Robert H. Wall, Esq.

For John Moody, Sr.:
Lawrence E. Florio, Esq.

The Court: Today is the return day of an Order to Show Cause requiring William Murphy and John Moody, Sr. to show cause before this Court why they should not be punished for contempt of court, pursuant to R. R. 4:46-5 (c).

The American Export Lines, Inc., which leases and operates waterfront piers and a terminal in Hoboken, New Jersey, employed one James H. Markley to be its Chief Security Officer in the Port of New York, including Hoboken. The employment of the said James H. Markley commenced May 16, 1960. Prior to the commencement of his employment with American Export Lines, he was an investigator for the Waterfront Commission and his principal assignment was to cover said piers and terminal of American Export Lines, Inc., in Hoboken.

On Monday, May 16, 1960, when the employment of James H. Markley for American Exports Lines commenced, a work stoppage began of the longshoremen and checkers employed by the American Export Lines in Hoboken, New Jersey. This work stoppage continued except for the morning of Tuesday, May 17, 1960, until Monday, May 23, 1960, when it ceased at 8 A.M., and the Court has been informed the men have been back to work continuously up to the present time.

Under the Waterfront Commission Act, the longshoremen and checkers who were participating in this work stoppage are required to be and are registered by the said Commission. Also, under the said Waterfront Commission Act, James H. Markley, as Chief Security Officer of American Export Lines, must be and is licensed by the Waterfront Commission as a port watchman.

The Waterfront Commission alleges it has information that this work stoppage was a concerted effort to keep James H. Markley off the piers of the American Export Lines in Hoboken. Accordingly, in order to determine whether this work stoppage constituted an illegal coercion of an employer (American Export Lines) to compel such employer to limit the functions of, or to discharge, a licensed port watchman (James H. Markley) and to further determine whether any person registered or licensed by the Waterfront Commission were participating in such illegal coercion, the Commission instituted the instant investigation. The foregoing is the purpose of the said investigation, as stated by the Commission.

In connection with such investigation, subpoenas of the

Waterfront Commission, returnable forthwith, were duly served on May 18, 1960, on William Murphy, the business agent of Local number 2 of the ILA, representing longshoremen in Hoboken, New Jersey, and upon John Moody, Sr., organizer for the ILA in the State of New Jersey. Both Murphy and Moody appeared at the offices of the Waterfront Commission in response to these subpoenas on the afternoon of May 19, 1960 (the duly adjourned return date of said subpoenas). Both Murphy and Moody, after answering certain various preliminary questions, refused to answer the following questions asked them pursuant to the aforesaid subpoenas.

Mr. John Moody, Sr., refused to answer the following questions:

"Q. Are you an official of any ILA local?"

"Q. Mr. Moody, will you tell us what local you are an official of?"

"Q. Mr. Moody, what position do you hold with the local of the ILA that you are affiliated with?"

"Q. All right, Mr. Moody, would you tell us when you first received news of any labor trouble on Piers 'A,' 'B' and 'C' in Hoboken?"

"Q. Mr. Moody, within the last week have you attended any conferences with the officials of the American Export Line with respect to the work stoppage at Piers 'A,' 'B' and 'C' in Hoboken?"

"Q. Have you had any conversation with Captain Andrews, Leland Andrews, of American Export Line with respect to the stoppage this week at Piers 'A,' 'B' and 'C' in Hoboken, New Jersey? When I say this week, I mean from May 16th to the present.

"Q. Mr. Moody, have you had any discussions or conversations with Captain Blackledge of the American Export Lines concerning the refusal to work at Piers 'A,' 'B' and 'C' of longshoremen in that particular—on those particular piers this week?"

"Q. Have you had any conversations with Michael McNamara, Senior Hiring Agent of the American Export Lines, concerning the work stoppages at Piers A, B and C that have occurred since May 1, 1960, to the present?"

"Q. Mr. Moody, have you at any time, either prior to the work stoppage which commenced on May 16th, 1960 or before that time or after that time, did you at any time issue orders for a work stoppage at Piers A, B, and C?"

"Q. Did you, before May 16th ever give any orders for the commencement of a work stoppage at Piers A, B, and C?"

"Q. Have you since May 16, in other words, May 16, May 17, May 18, and May 19, have you on these particular days issued any instructions concerning work stoppages, any instructions, now both either commencing or ceasing the stoppages at Piers A, B, and C, Hoboken?"

"Q. Have you had any conversations with anyone since May 16, 1960 to the present concerning the work stoppages at Piers A, B, and C?"

"Q. What is your function with the local in Hoboken?"

"Q. What is your position with the union?"

"Q. Mr. Moody, were you present at Piers A, B and C, Hoboken, on Monday of this week?"

"Q. Were you at the piers on Tuesday?"

Mr. William Murphy refused to answer the following questions:

"Q. Now, for the record, Mr. Murphy, did you have anything to do with causing the strike that is presently pending at the American Export Line?"

"Q. Did you, in any way, participate in this work stoppage to compel the American Export Line to discharge, or to limit the duties of our employee by the name of James Markley?"

Mr. Murphy refused to give any further testimony.

Mr. Moody and Mr. Murphy based their refusals to testify on the following grounds:

1. The work stoppage is a matter which the Commission has no statutory authority to investigate.

2. The work stoppage is a matter over which the National Labor Relations Board has exclusive jurisdiction.

3. The Commission has no right to investigate the work stoppage since civil litigation may ensue as a result thereof. (The American Export Lines has threatened to sue the ILA.)

4. The Commission's investigation seeks to inquire into privileged communications between union and management and/or between union representatives.

By way of answering statement and affidavit, Mr. William Murphy states:

1. He is a Business Agent for Local 2 of the International Longshoremen's Association.

2. He has never been convicted of a crime and in spite of his being acquitted of a charge, the Waterfront Commission of the Port of New York arbitrarily denied him the right to work on the waterfront.

"Q. Mr. Moody, have you had any discussions or conversations with Captain Blackledge of the American Export Lines concerning the refusal to work at Piers 'A,' 'B' and 'C' of longshoremen in that particular—on those particular piers this week?"

"Q. Have you had any conversations with Michael McNamara, Senior Hiring Agent of the American Export Lines, concerning the work stoppages at Piers A, B and C that have occurred since May 1, 1960, to the present?"

"Q. Mr. Moody, have you at any time, either prior to the work stoppage which commenced on May 16th, 1960 or before that time or after that time, did you at any time issue orders for a work stoppage at Piers A, B, and C?"

"Q. Did you, before May 16th ever give any orders for the commencement of a work stoppage at Piers A, B, and C?"

"Q. Have you since May 16, in other words, May 16, May 17, May 18, and May 19, have you on these particular days issued any instructions concerning work stoppages, any instructions, now both either commencing or ceasing the stoppages at Piers A, B, and C, Hoboken?"

"Q. Have you had any conversations with anyone since May 16, 1960 to the present concerning the work stoppages at Piers A, B, and C?"

"Q. What is your function with the local in Hoboken?"

"Q. What is your position with the union?"

"Q. Mr. Moody, were you present at Piers A, B and C, Hoboken, on Monday of this week?"

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4. The Commission's investigation seeks to inquire into privileged communications between union and management and/or between union representatives.

By way of answering statement and affidavit, Mr. William Murphy states:

1. He is a Business Agent for Local 2 of the International Longshoremen's Association.

2. He has never been convicted of a crime and in spite of his being acquitted of a charge, the Waterfront Commission of the Port of New York arbitrarily denied him the right to work on the waterfront.

3. There exists a contract between the American Export Lines and Local 2 of the International Longshoremen's Association and said contract covers any and all labor problems, together with a method of resolving same. The National Labor Relations Board has full control and jurisdiction of any labor disputes.

4. The Waterfront Commission of the Port of New York does not have any jurisdiction of any labor problems under Statute 32:23-1, et seq. It appears in the Notice of Motion and more particularly paragraph 2 thereof, that it has depended for its jurisdiction in this matter on a report of the New York State Crime Commission, which report was filed prior to the enactment of the Waterfront Commission Statute in New Jersey.

5. There does not exist any accusation or charges setting forth a reason for intermeddling in a purely labor situation. In fact, William P. Sirignano, General Counsel and Hearing Officer in the instant matter, so stated at the hearing.

6. He qualified his refusal to answer stating that he was threatened with a suit, that a labor dispute was in progress, and he felt that any requirements to answer would deprive him and the members of Local 2 of their rights under the 14th Amendment of the United States Constitution and, further, that the Waterfront Commission of the Port of New York has no jurisdiction in the labor problem.

7. He is not registered or licensed by the Waterfront Commission of the Port of New York, and, therefore, in accordance with Paragraph 9 of the Notice of Motion, in which the Commission states that it "desired to determine

whether any persons registered and licensed by the Waterfront Commission are participating in such illegal coercion," he does not come under the control of the Waterfront Commission are participating in such illegal coerreference to any jurisdiction of the Port of New York concerning labor and labor representatives as such is to be found in N. J. S. A. 32:23-10, paragraph 12, "To advise and consult with representatives of labor and industry, etc."

8. It is apparent that a labor dispute exists under full control of the United States Government, National Labor Relations Board, and to allow the Waterfront Commission of the Port of New York to intermeddle would lead to the impairment of the existing contractual relationships between labor and management.

The Waterfront Commission contends the subject matter of the present investigation is within its statutory authority. The purpose of the present investigation is to determine whether the work stoppage involved herein constituted an illegal coercion of an employer (American Export Lines) to compel such employer to limit the functions of, or to discharge, a licensed port watchman (James A. Markley) and, further, to determine whether any persons registered or licensed by the Waterfront Commission are participating in such illegal coercion.

The Commission relies on N. J. S. A. 32:23-10, General Powers, which provides in part:

In addition to the powers and duties elsewhere prescribed in this compact, the Commission shall have the power:

"(11) To make investigations, collect and compile information concerning waterfront practices generally within the port of New York district and upon all matters relating to the accomplishment of the objectives of this compact."

The Commission cites *Matter of the Application of the Waterfront Commission of New York Harbor to Punish Anthony Marchito for Failure to Obey a Subpoena*, decided May 9, 1960, wherein the Supreme Court, Justice Haydn Proctor, speaking for the Court, held:

"The trial court had before it uncontradicted affidavits showing that the purpose of the Commission's investigation was to ascertain the facts concerning the issuance of local charters by the ILA to criminal elements. Clearly, the fact that known hoodlums and criminals may be exercising influence in the ILA is a matter within the Commission's statutory power 'to make investigations, collect and compile information concerning waterfront practices generally.' "

The Commission further contends the instant investigation is not in any respect proscribed by the National Labor Relations Act for the reasons:

1. The Commission is simply investigating information that it has that the work stoppage constituted a concerted effort to keep James H. Markley off the piers of the American Export Lines in Hoboken in order that it, the Commission, may intelligently act in the premises. In this regard, the Commission cites *ICC* v. *Goodrich Transit Co.*, 224 U. S. 194, 211 (1912), for the proposition that "the requiring of information concerning a business is not regulation of that business."

2. The instant work stoppage was in violation of a no-strike clause contained in a collective bargaining agreement in force between the New York Shipping Association, Inc., and the ILA. The clause provides as follows:

"Part III. Prohibition of Lockouts, Strikes or Work Stoppages.

"During the life of this agreement, the party of the first part agrees there shall be no lockouts or work stoppages by the employers but this shall not be construed to mean a lay-off of employees due to business conditions, and the party of the second part agrees there shall be no strikes or work stoppages by the employees. The right of employees not to cross a bona fide picket line is recognized by the employers."

Thus, the instant work stoppage in violation of the above no-strike clause is outside the protection or purview of the National Labor Relations Act. Citing, *NLRB* v. *Dorsey Trailers*, 179 Federal, 2d 589 (5th Cir. 1950); *NLRB* v. *Columbian Enameling & Stamping Co.*, 96 Federal, 2d 984 (7th Cir. 1938), affirmed on another ground 306 U. S. 292.

And since the instant work stoppage is outside the purview of the National Labor Relations Act, the Commission contends it is cognizable by the state courts or agencies. Citing *Philadelphia Marine Trade Association* v. *ILA*, 382 Pa. 326, 115 Atlantic 2nd 733 (1955); *Parodi Cigar Co. of New York* v. *Gaeta*, 156 N. Y. S. 2nd 282 (Supreme Court Queens 1956).

3. Section 9(b) (3) of the National Labor Relations Act (29 U. S. C. 159 (b) (c)) explicitly provides that the National Labor Relations Board shall not certify as a col-

lective bargaining unit a group which includes guards or watchmen together with other employees. Since the instant work stoppage of longshoremen and checkers was about the employment of James Markley, a guard or watchman on the pier, it appears for this reason to be outside the purview of the National Labor Relations Act.

In support of this contention the Commission cites *S-M News Co.* v. *Simons,* 279 App. Div. 364, 110 N. Y. S. 2nd 175, 179, where an injunction was issued against a work stoppage to compel the giving of business to a relative of the union president.

The Commission further contends that the threat of civil litigation is no ground for a refusal to answer questions pertaining to the work stoppage here involved. See *Bowles* v. *Bay of New York Co. & Supply Corp.,* 152 Federal 2nd 330 (2nd Circuit 1945) and 8 *Wigmore,* Section 2223 (11) (1940 Ed.).

It is the further contention of the Commission that no privilege exists concerning communication between union and management and/or between union representatives.

The National Labor Relations Act defines the following terms that the Court has considered:

"Strike"—29 U. S. C. A. 142.

"Labor dispute"—29 U. S. C. A. 152

"Involve or grow out of labor dispute.

"A case shall be held to involve or grow out of a labor dispute when the cases involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or association of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a labor dispute (as defined in this section) of 'persons parcticipating or interested therein' (as defined in this section)."

The foregoing is to be found in 29 U. S. C. A. 113.

I have also considered:

"Unfair labor practice.

"It shall be an unfair labor practice for a labor organization or its agents

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 157 of this title.

"(4) (D) forcing or requiring any employer to sign particular work to employees in a particular labor organization or in a particular trade, craft or class rather than to employees in another labor organization or in another trade, craft or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work."

Section 157 of that Act provides:

"Right of employees as to organization, collective bargaining, etc.

"Employees shall have the right to self organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) of this title."

The National Labor Relations Board is empowered to prevent any person from engaging in an unfair labor practice affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise. 28 U. S. C. A. 160.

Article XV of the Waterfront Commission Act, N. J. S. A. 32:23-68, provides:

"Certain rights of employees not limited by compact.

"This compact is not designed and shall not be construed to limit in any way rights granted or derived from any other statute or any rule of law for employees to organize in labor organizations, to bargain collectively and to act in any other way individually, collectively, and through labor organizations or other representatives of their own choosing. Without limiting the generality of the foregoing, nothing contained in this compact shall be construed to limit in any way the right of employees to strike."

Jurisdiction in matters involving labor disputes and unfair labor practices has been expressly granted to the National Labor Relations Board as embodied in the National Labor Relations Act. On the other hand, jurisdiction granted to the Waterfront Commission by the Waterfront Commission Act is limited. It is subject to rights of employees which have been granted or derived from any other statute or rule of law. The power of the Waterfront Commission is expressly subject to the right of employees to strike.

The determination of whether the National Labor Relations Board has jurisdiction in a particular case can only be made by that Board.

Mr. Justice Frankfurter bears out this fact when speaking for the United States Supreme Court in the case of *San Diego Unions* v. *Garman*, 359 U. S. 236, at page 244, referring to Sections 7 and 8 of the National Labor Relations Act:

"At times it has not been clear whether the particular activity regulated by the states was governed by section 7 or 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board."

Further, Mr. Justice Frankfurter says at page 245:

"When the activity is arguably subject to section 7 or 8 of the Act, the state as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."

Sections 7 and 8 of the National Labor Relations Act discussed by Mr. Justice Frankfurter govern both concerted activities and unfair labor practices. They regulate the vital economic instruments of the strike and picket line and unsettled claims between employers and labor unions.

The authority for the Waterfront Commission to make investigations such as here in question is found in N.J.S.A. 32:23-10, General Powers, which provides in part:

> "In addition to the powers and duties elsewhere prescribed in this compact, the Commission shall have the power:
>
> "11) To make investigations, collect and compile information concerning waterfront practices generally within the port of New York district and upon all matters relating to the accomplishment of the objectives of this compact.
>
> "13) To make annual and other reports to the Governors and Legislature of both States containing recommendations for the improvement of the conditions of waterfront labor within the port of New York district, for the alleviation of the evils described in Article I and for the effectuation of the purposes of this compact."

As was above noted, the objectives and purposes of this compact may not be extended to limit rights granted to employees by any other statute or rule of law. N. J. S. A. 32:23-68.

The right to have labor disputes settled by the National Labor Relations Board and the right to have the National Labor Relations Board determine if it has jurisdiction in a particular controversy are rights which this compact may not limit, and it is not being contended here that they have any such rights.

In the present case the Waterfront Commission states it has information that this work stoppage was a concerted effort to keep James H. Markley off the piers of the American Export Lines in Hoboken, New Jersey, and, accordingly, as I have already stated, in order to determine whether this work stoppage constituted an illegal coercion of an employer to compel such employer to limit the functions of, or to discharge, a licensed port watchman, the Commission instituted the instant investigation.

See *NLRB* v. *Dorsey Trailers, supra,* and *NLRB* v. *Columbia Enameling and Stamping Co., supra.*

In the *Marchitto* case, *supra,* Mr. Justice Proctor said:

"The Commission's investigative function within its statutory jurisdiction is very like that of a grand jury. It must not act arbitrarily, or in excess of its jurisdiction, but the scope of its investigations is not to be limited by conjectural forecasts of their probable result."

Further in the same opinion, he said:

"No doubt the interests of men to be free from officious intermeddling call for protection. But we feel that these interests may be adequately protected without a full judicial trial at the threshhold of an investigation into the question whether it will uncover matter which should in the public interest be uncovered. The obligation of a subpoena cannot rest on a trial of the value of the testimony sought. It is enough that the proposed investigation be for a lawfully authorized purpose, and that the proposed witness be claimed to have information that might shed some helpful light."

This investigation is both lawful and authorized.

The Waterfront Commission, of course, further contends the National Labor Relations Board does not have jurisdiction since 29 U. S. C. A., Section 159 (b) (3) explicitly provides the National Labor Relations Board shall not certify as a collective bargaining unit a group which includes guards or watchmen together with other employees.

However, even though the National Labor Relations Board refused to certify the Independent Watchmen's Association, the Board did certify the locals representing the longshoremen and checkers who participated in this work stoppage.

See *S-M News Co.* v. *Simons, supra.*

Therefore, it seems to me, for the reasons above stated, that the Rule to Show Cause has merit and that the Court is constrained to find both Messrs. Murphy and Moody guilty of contempt.

The Court, naturally, if they so desire, will afford an opportunity for these gentlemen to purge themselves of such contempt within a reasonable time.

Mr. Pin: May I interrupt the Court briefly? It is my understanding that the rules provide that on an adjudication of contempt, the Court shall further find whether the contempt is civil or criminal or both, and for the record, may I have your finding?

The Court: Civil.

APPENDIX E—Judgments Below

Mandate on Modification

SUPREME COURT OF NEW JERSEY

Appeal Docket No. 3930

Civil Action On Appeal

In the Matter of the Application of the Waterfront Commission of New York Harbor, to punish John Moody, Sr. for failure to obey a Subpoena.

In the Matter of the Application of the Waterfront Commission of New York Harbor, to punish William Murphy for failure to obey a Subpoena.

This cause having been duly argued before this Court by Mr. Harold Krieger, counsel for the appellants and Mr. Robert A. Pin and Mr. Irving Malchman, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgments of the said Superior Court—Law Division be and the same hereby are modified; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Superior Court—Law Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

Witness the Honorable Joseph Weintraub, Chief Justice, at Trenton on the fourth day of March, 1963.

Filed
Mar 4 1963

John H Gildea
Clerk

John H. Gildea
Clerk of the Supreme Court

A True Copy

John H. Gildea
Clerk

Appendix E—Judgments Below

Judgment (Re: John Moody, Sr.)

(Filed—December 4, 1961)

This matter being opened by Robert A. Pin, Esq. Attorney for the Waterfront Commission of New York Harbor, the moving party, in the presence of Harold Kreiger, Esq. and Robert Wall, Esq., Attorneys for John Moody, Sr., upon the return of an order of this court dated November 1, 1961, directing said John Moody, Sr. to show cause why he should not be adjudged guilty of criminal and civil contempt for failure to obey a subpoena issued by the Waterfront Commission of New York Harbor, an administrative agency, and in accordance with the opinion of this court dated November 22, 1961, defendant John Moody Sr. was adjudged guilty of criminal and civil contempt in his failure to answer certain questions as required by the subpoena, on the 27th day of October, 1961:

1. Q. "Mr. Moody, are you an official of the International Longshoreman's Association Independent or the International Longshoremen's Association which is affiliated with the AFL-CIO?"

2. Q. "Mr. Moody, I direct your attention to a work stoppage that occurred on Monday, May 16, 1960 Piers A, B, and C, Hoboken, the American Export Lines Terminal. Did you have any prior knowledge that the work stoppage was to take place on Monday, May 16, 1960, at that terminal?"

3. Q. "Mr. Moody, would you tell the Commission on the source of the knowledge that you have concerning the work stoppage, Piers A, B, and C, Hoboken, May 16, 1960?"

4. Q. "Mr. Moody, did you, at any time, prior to May 16, 1960 give orders to any longshoreman, shop stewards or others to commence a work stoppage on Monday, May 16, 1960, because of the presence of one James Markley on the piers as a security officer?"

5. Q. "Mr. Moody, did you have any conversations with any other union official of the International Longshoreman's Association prior to May 16, 1960 about calling a strike concerning James Markley's presence on the Hoboken Terminal as a security officer?"

6. Q. "Did you have a conversation about calling a strike during the week of May 16, 1960, with one Mr. Gleason of the I. L. A.?"

7. Q. "On the 17th of May, 1960 were you present on the terminal in Hoboken, which is called the American Export Lines Terminal? Were you present?"

8. Q. "Did you, on that date, May 17, 1960, tell the shop stewards, Frank Rump, Carmine Bruno, Eric Lempke to call the longshoremen out on strike because of the presence of Mr. Markley on the piers as a security officer?"

9. Q. "Did you attend the meeting on May 17, 1960 in the offices of the American Export Lines at the Hoboken Terminal? Did you attend such a meeting?"

10. Q. "Did you at that meeting state to Leland Andrews another official of the American Export Lines who attended the meeting, if Mr. Markley works on the piers there would be a work stoppage?"

11. Q. "Prior to May 16, 1960, or during the week of May 16, 1960, did you have a conversation with Michael McNamara, concerning a work stoppage to be called on May 16, 1960, over the presence of James Markley from the Hoboken Terminal, as a security officer?"

12. Q. "Do you know Michael McNamara, Mr. Moody?"

13. Q. "Do you know Mr. William Murphy?"

14. Q. "Do you know Leland Andrews, Mr. Moody?"

15. Q. "Do you know Mr. Lyle Bul, Executive Vice President, American Export Lines?"

16. Q. "Did you, at any time, either in Hudson County, in the State of New Jersey, or in the County of New York, in the State of New York, have any discussions, with any executives of the American Export Lines, concerning Mr. Markley's employment with that shipping company?"

17. Q. "Do you know whether Mr. Markley has been on the piers in the performance of his duties as a security officer of the American Export Lines, since his employment in May, 1960?"

At the time of the return of the order to show cause and on the same date, there was argued a motion to quash the subpoena of John Moody, Sr., which was consolidated with the motion of the Waterfront Commission.

There were also motions made by defendant for a jury trial and for a bill of particulars on the charge of criminal contempt and a demand for interrogatories on the civil contempt charge, which said motions were all denied by this court.

It is on this 4th day of Dec., 1961, as appears in the opinion-memorandum of this court, ordered and adjudged that defendant, John Moody, Sr., is guilty of both criminal and civil contempt, and it is the sentence of this court that said defendant be fined $50.00 and sentenced for a period of 30 days, and a warrant to issue accordingly.

IT IS FURTHER ORDERED that the subpoena is to be obeyed and performed by the giving of responsive answers to the aforesaid questions before the members of the Waterfront Commission of New York Harbor, or their designees, appointed pursuant to the provisions of Sec. 3—Art. III of the Waterfront Commission Act (N. J. S. 32:23-9), and that he stand committed to the Hudson County Jail until he has complied with this paragraph of this order, as well as until such fine has been paid.

IT IS FURTHER ORDERED and ADJUDGED that the execution of a warrant be stayed until the disposition of the appeal in this matter, bond having been heretofore posted pursuant to the order of this court.

JOSEPH L. SMITH, *J. S. C.*

Appendix E—Judgments Below

Judgment (Re: William Murphy)

(Filed—December 4, 1961)

This matter being opened by Robert A. Pin, Esq., Attorney for the Waterfront Commission of New York Harbor, the moving party, in the presence of Harold Krieger, Esq., and Robert Wall, Esq., Attorneys for William Murphy, upon the return of an order of this court dated November 1, 1961, directing said William Murphy to show cause why he should not be adjudged guilty of criminal and civil contempt for failure to obey a subpoena issued by the Waterfront Commission of New York Harbor, an administrative agency, and in accordance with the opinion of this court dated November 22, 1961, defendant William Murphy was adjudged guilty of criminal and civil contempt in his failure to answer certain questions as required by the subpoena on the 27th day of October, 1961:—

1. Q. "Are you an official of the ILA, Independent?"
2. Q. "I direct your attention to a work stoppage that occurred on Monday, May 16, 1960 at Piers A, B, C, Hoboken, the American Export Lines Terminal. Did you have any prior knowledge that a work stoppage would occur Monday, May 16th at the said terminal?
3. Q. "Mr. Murphy, when did you first hear that a work stoppage was in progress at Piers A, B, and C, Hoboken? And I am referring to the May 16th, 1960 work stoppage."
4. Q. "Mr. Murphy, who were the persons that gave you the information about the work stoppage on

May 16, 1960 at the Hoboken Terminal of the American Export Lines?"

5. Q. "Mr. Murphy, did you, at any time, give orders to longshoremen or others such as shop stewards that a work stoppage was to take place on May 16, 1960 at the American Export Line Terminal in Hoboken?"

6. Q. "Mr. Murphy, do you know whether the work stoppage that took place on May 16, 1960 at the American Export Line Terminal was relating to the presence of one James Markley on the piers as a security officer?"

7. Q. "Mr. Murphy, did you have any conversation with any union officials of the I. L. A. prior to May 16, 1960 about the presence of James Markley on the Hoboken Terminal as a security officer?"

8. Q. "On May 16th, 1960, did you Mr. Murphy, have a conversation with one Leland Andrews concerning this work stoppage that took place on May 16, 1960 at the American Export Line Pier?"

9. Q. "Did you, in the conversation with Mr. Andrews on the 16th day of May, 1960, reach any agreement over the presence of Mr. Markley on the Hoboken Terminals of the American Export Lines in Hoboken?"

10. Q. "Mr. Murphy, on the morning of the 17th of May, 1960, were you on American Export Line Hoboken Terminal?"

11. Q. "Mr. Murphy, on May 17th, 1960, at the Hoboken Terminal of the American Export Line, did you have a conversation with one Michael McNamara?"

12. Q. "Mr. Murphy, on the morning of May 17th, 1960 at the American Export Line Terminal in Hoboken, did you have a conversation with one Frank Rump?"

13. Q. "Mr. Murphy, on the morning of May 17th, 1960, did you have a conversation with one Carmine Bruno?"

14. Q. "Mr. Murphy, on the morning of May 17th, 1960, at the Hoboken Terminal, did you have a conversation with one Eric Lempke?"

15. Q. "Mr. Murphy, on the morning of May 17th, 1960 did you have a meeting with officials of the American Export Line at the Hoboken Terminal of the American Export Line?"

16. Q. "Did you, at that time, reach any agreement concerning the presence of Mr. Markley on the Hoboken Terminal as a security officer?"

17. Q. "Did you ever make any demand from any officer of American Export Line to fire Mr. Markley before the men went back to work?"

18. Q. "Did you tell any officer of the American Export Lines that the men would not go back to work until Mr. Markley was kept off the piers?"

19. Q. "Mr. Murphy, did you have a meeting with the Executive Vice-President of the American Export Line at the offices of the American Export Line at 39 Broadway in New York City in August, 1960?"

20. Q. "Mr. Murphy, did you, at that meeting with the Executive Vice-President of the American Export Line, state that if Mr. James Markley walked on Piers A, B and C in Hoboken, there would be a strike?"

21. Q. "Did you, Mr. Murphy, ever discuss or give any orders to any shop stewards or officials of your local to pull the men out of Piers A, B and C in the event Mr. Markley walked onto the piers in May of 1960 in the performance of his duty as a security officer for the American Export lines?"

22. Q. "Mr. Murphy, do you know now whether Mr. Markley has ever, since May, 1960, walked on the piers in Hoboken, New Jersey of the American Export Lines in connection with his duties as a security officer for that company?"

23. Q. "Mr. Murphy, do you know if Mr. Markley was at one time employed by this Commission in any capacity whatsoever?"

24. Q. "Mr. Murphy, did you, in August, 1960, tell the Executive Vice-President of the American Export Line that if Mr. Markley stepped on the piers there would be a walkout?"

25. Q. "In the event that Mr. Markley walked on the piers of Hoboken, New Jersey today on the American Export Lines, would you order the membership of the I. L. A. present there off the piers?"

At the time of the return of the order to show cause and on the same date, there was argued a motion to quash the subpoena of John Moody, Sr., which was consolidated with the motion of the Waterfront Commission.

There were also motions made by defendant for a jury trial and for a bill of particulars on the charge of criminal contempt and a demand for interrogatories on the civil contempt charge, which said motions were all denied by this court.

It is on this 4th day of December, 1961, as appears in the opinion-memorandum of this court, ORDERED and ADJUDGED that defendant, William Murphy, is guilty of both criminal and civil contempt, and it is the sentence of this court that said defendant be fined $50.00 and sentenced for a period of 30 days, and a warrant to issue accordingly.

IT IS FURTHER ORDERED that the subpoena is to be obeyed and performed by the giving of responsive answers to the aforesaid questions before the members of the Waterfront Commission of New York Harbor, or their designees, appointed pursuant to the provisions of Sec. 3-Art. III of the Waterfront Commission Act (N. J. S. 32:23-9), and that he stand committed to the Hudson County Jail until he has complied with this paragraph of this order, as well as until such fine has been paid.

It Is Further Ordered and Adjudged that the execution of a warrant be stayed until the disposition of the appeal in this matter, bond having been heretofore posted pursuant to the order of this court.

Joseph L. Smith,
J.S.C.

APPENDIX F

Statutes and Rules of Court

I.

N.J.S.A. 32:23-6 [*McKinney's Unconsol. Laws,* §6700bb]

> " 'Compact' shall mean this compact and rules or regulations lawfully promulgated thereunder." (D5a)

N.J.S.A. 32:23-85(7) [*McKinney's Unconsol. Laws,* §6700tt-1(7)]

> " 'Compact' shall also include any amendments or supplements to the waterfront commission compact to implement the purposes thereof adopted by the action of the legislature of either the state of New York or the State of New Jersey concurred in by the legislature of the other." (D5a) [The foregoing provision is not part of the compact as consented to by Congress in 1953]

II

N.J.S.A. 32:23-86(5) [*McKinney's Unconsol. Laws,* §6700tt-2(5)]:

> "In addition to the powers and duties elsewhere prescribed in this act, the commission shall have the following powers:
>
> * * * * * *
>
> "To confer immunity, in the following manner: In any investigation, interview or other proceeding conducted under oath by the commission or any duly authorized officer, employee or agent thereof, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may

be incriminated thereby, and notwithstanding such refusal, an order is made upon twenty-four hours' prior written notice to the appropriate attorney general of the state of New York or the state of New Jersey, and to the appropriate district attorney or prosecutor having an official interest therein, by the unanimous vote of both members of the commission or their designees appointed pursuant to the provisions of section three of article III of this act, that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this subdivision, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein.

" 'Immunity' as used in this subdivision means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by the unanimous vote of both members of the commission or their designees appointed pursuant to the provisions of section three of article III of this act, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt.

" 'Immunity' shall not be conferred upon any person except in accordance with the provisions of this subdivision. If, after compliance with the provisions of this subdivision, a person is ordered to answer a question or produce evidence of any other kind and complies with such order, and it is thereafter determined that the appropriate attorney general or district attorney or prosecutor having an official interest therein was not notified, such failure or neglect shall not deprive such person of any immunity otherwise properly conferred upon him." [32:23-86].

III.

R.R. 4:46-5(c)

"Where a statute provides that failure of a person to obey a subpoena or order of a public officer or administrative agency or a receiver, to testify, to answer a proper question, or to produce books, papers, documents or tangible things, or that misconduct on the part of a person attending a hearing, shall be punishable by the court in the same manner as like failure or misconduct is punishable in a case pending in the court, the matter shall be brought before the court by motion supported by affidavit, stating the circumstances. Upon the motion the court may issue an order to show cause, returnable in not less than 2 nor more than 10 days, requiring the person to show cause before the court why he should not be punished; or the court may issue an attachment. If the court determines that the failure or misconduct above mentioned was without justification, it may punish him as for a contempt of court."

N.J.S.A. 32:23-6:

"The failure of any witness, when duly subpoenaed to attend, give testimony or produce other evidence, whether or not at a hearing, shall be punishable by the superior court in New Jersey and the supreme court in New York in the same manner as said failure is punishable by such court in a case herein pending."

R.R. 4:87-1: Contempt in the Presence of the Court:

"A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record."

R.R. 4:87-2: Proceedings Upon Notice:

"Every other contempt, whether of a criminal or civil nature, shall be prosecuted on notice, and if it occurs in an action, it shall be prosecuted in the action in which it occurs. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense and shall state the essential facts constituting the contempt charged. Whether the contempt charged is criminal or civil in nature, the notice may be given by an order to show cause; and the person charged with contempt may, not later than 1 day before the return of such an order, or within such time as the court may allow, serve an answer or an answering affidavit, or he may plead orally at the hearing. In any cause in which the court determines that the contempt charged may be criminal in nature—

(a) The notice may be given orally by the judge in open court in the presence of the person charged with contempt or by an order of arrest, or, as stated, by an order to show cause.

(b) If the person charged with contempt gives to the clerk of the court a good and sufficient bond for his appearance at the hearing, approved by any one of the judges of the Appellate Division, he shall be admitted to bail pending the hearing.

(c) The court may designate as prosecutor of the proceeding, the Attorney General, the county prosecutor or any other attorney of this State.

(d) If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the consent of the person charged with contempt.

(e) If the substance of the charge is a violation of an order or judgment of the court, the judge who made the order or judgment is likewise disqualified, except that proceedings charging contempt of an order issued in aid of judgment or execution may be heard by the judge who made such order.

The procedure by attachment may be invoked in the case of witnesses or persons not parties to the action, but it is superseded in the case of parties. Interrogatories are not required.

Note: Effective September 9, 1953; paragraph (e) amended June 27, 1955 to be effective September 7, 1955. Formerly Rule 3:80-2, amended November 10, 1949; January 1, 1952."

IV.

N.J.S.:

"2A:84A-18. Definition of incrimination.

Rule 24.

Within the meaning of this article, a matter will incriminate (a) if it constitutes an element of a crime against this State, or another State *or the United States*, or (b) is a circumstance which with other circumstances would be a basis for a reasonable inference of the commission of a such a crime, or (c) is a clue to the discovery of a matter which is within clauses (a) or (b) above; provided, a matter will not be held to incriminate if it clearly appears that the witness has no reasonable cause to apprehend a criminal prosecution. In determining whether a matter is incriminating under clauses (a), (b) or (c) and whether a criminal prosecution is to be apprehended, other matters in evidence, or disclosed in argument, the implications of the question, the setting in which it is asked, the applicable statute of limitations and all other factors, shall be taken into consideration. L. 1960, c. 52, p. §18.

2A:84A-19. Self-incrimination: exceptions

Rule 25.

Subject to Rule 37 every natural person has a right to refuse to disclose in an action or to a police officer or other official any matter that will incriminate him or expose him to a penalty or a forfeiture of his estate * * *

* * *

2A:84A-32. Effect of error in overruling claim of privilege

Rule 40.

* * *

(2) If a witness refuses to answer a question, under color of a privilege claimed pursuant to Rules 23 through 38, after the judge has ordered the witness to answer, and a contempt proceeding is brought against the witness, the court hearing the same shall order it dismissed if it appears that the order directing the witness to answer was erroneous. L. 1960, c. 52, p.   §32.'' (Emphasis supplied.)

V.

N.J.S.A. 32:23-10 (8, 11) [*McKinney's Uncol. Laws*, §§6700 *dd* (8, 11)]:

''In addition to the powers and duties elsewhere prescribed in this compact, the commission shall have the power:

* * *

''8. By its members and its properly designated officers, agents and employees, to administer oaths and issue subpoenas throughout both states to compel the attendance of witnesses and the giving of testimony and the production of other evidence;

* * *

''11. To make investigations, collect and compile information concerning waterfront practices generally within the port of New York district and upon all matters relating to the accomplishment of the objective of this compact;''

N.J.S.A. 32:23-62 [*McKinney's Unconsol. Laws,* §6700 *nn* (1)]:

> "The failure of any witness, when duly subpoenaed to attend, give testimony or produce other evidence, whether or not at a hearing, shall be punishable by the superior court in New Jersey and the supreme court in New York in the same manner as said failure is punishable by such court in a case therein pending."

N.J.S.A. 32:23-85 (4) [*McKinney's Unconsol. Laws,* §6700 *tt*-1]:

> " 'Witness' shall mean any person whose testimony is desired in any investigation, interview or other proceeding conducted by the commission pursuant to the provisions of this act."

N.J.S.A. 32:23-88 [*McKinney's Unconsol. Laws,* §6700tt-4]:

> "Any person who, having been duly sworn or affirmed as a witness in any investigation, interview or other proceeding conducted by the commission pursuant to the provisions of this act, shall wilfully give false testimony shall be guilty of a misdemeanor punishable by a fine of not more than one thousand dollars or imprisonment for not more than one year or both." (D38a) [The foregoing provision is not part of the compact as consented to by Congress in 1953]

N.J.S.A. 32:23-89 [*McKinney's Unconsol. Laws,* §6700tt-5]:

> "The commission may maintain a civil action on behalf of the state against any person who violates or

attempts or conspires to violate any provision of the compact or who fails, omits or neglects to obey, observe or comply with any order or direction of the commission, to recover a judgment for a money penalty not exceeding five hundred dollars for each and every offense. Every violation of any such provision, order or direction shall be a separate and distinct offense, and, in case of a continuing violation, every day's continuance shall be and be deemed to be a separate and distinct offense. * * * " (D38a) [The foregoing provision is not part of the Compact as consented to by Congress in 1953]

N.J.S.A. 32:23-90 [*McKinney's Unconsol. Laws,* §§6700tt-6]:

"The commission may maintain a civil action against any person to compel compliance with any of the provisions of the compact, or to prevent violations, attempts or conspiracies to violate any such provisions, or interference, attempts or conspiracies to interfere with or impede the enforcement of any such provisions or the exercise or performance of any power or duty thereunder, either by mandamus, injunction or action or proceeding in lieu of prerogative writ." (D38a) [The foregoing provision is not part of the Compact as consented to by Congress in 1953]

VI

N.J.S.A. 32:23-10(12) [*McKinney's Unconsol. Laws,* 6700dd(12)]:

" * * * the commission shall have power"

* * *

"12. To advise and consult with representatives of labor and industry and with public officials and agencies concerned with the effectuation of the purposes of this compact, upon all matters which the commission may desire, including but not limited to the form and substance of rules and regulations, the administration of the compact, maintenance of the longshoremen's register, and issuance and revocation of licenses."

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Supreme Court of the United States

OCTOBER TERM, 1962 3

No. [illegible] 138

JOHN MOODY, SR. and WILLIAM MURPHY,
Petitioners,
vs.
THE WATERFRONT COMMISSION OF
NEW YORK HARBOR,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX

PAGE

Statement 1

Reasons for Denying the Writ 5

I—Petitioners did not have a constitutional right to refuse to testify upon the ground that the Commission's grant of immunity from prosecution extended only to state, and not to federal, crimes 5

II—Moreover, this is a singularly inappropriate case in which to consider a claim of federal incrimination upon a grant of state immunity because here that issue is seriously complicated by questions of waiver, estoppel and reasonableness .. 8

III—Petitioners' subsidiary contentions respecting the within civil contempt judgments (that they were entitled to a jury trial; that they were entitled to a trial on the issue of their good faith; that they were entitled to know what information was contained in the Commission's files; and that they were denied the equal protection of the laws) are plainly unsubstantial 14

Conclusion 17

TABLE OF CASES

Cleary v. Bolger, 371 U. S. 392 8

Commissioner v. Shamberg's Estate, 144 F.2d 998 (2d Cir. 1944), cert. den., 323 U. S. 792 8

PAGE

DeVeau v. Braisted, 363 U. S. 144 7

Feldman v. United States, 322 U. S. 487 6

Green v. United States, 356 U. S. 165 14

Hinderlider v. La Plata River Co., 304 U. S. 92 8

Hoffman v. United States, 341 U. S. 479 13

In re Application of Waterfront Commission, 35 N. J. 62 (1961), appeal dism'd and cert. den., 368 U. S. 32 4

Knapp v. Schweitzer, 357 U. S. 371 .... 6, 7

Langnes v. Green, 282 U. S. 531 9

McComb v. Jacksonville Paper Co., 336 U. S. 187 15

Mapp v. Ohio, 367 U. S. 643 6

Marshall v. Pletz, 317 U. S. 383 9

Mills v. State of Louisiana, 360 U. S. 230 7

National Association for the Advancement of Colored People v. Alabama, 360 U. S. 240 11

Oklahoma Press Publishing Co. v. Walling, 327 U. S. 186 16

Scarano v. Central R. Co. of New Jersey, 203 F.2d 510 (3rd Cir. 1953) 12

Sinclair v. United States, 279 U. S. 263 15

Sola Electric Co. v. Jackson Electric Co., 317 U. S. 173 9

United States v. American Ry. Express Co., 265 U. S. 425 9

United States v. Pink, 351 U. S. 302 9

STATUTES

PAGE

Act of August 12, 1953, c. 407, 67 Stat. 541 7

New Jersey Laws 1956, c. 194 5

New York Laws 1957, c. 188 5

New York Penal Law, Section 2447 .... 5, 6

Waterfront Commission Act, Section 5-b(5) (N.J.S.A. 32: 23-86) 4, 5

MISCELLANEOUS

McKinney's 1957 Session Laws of New York (Legislative Memorandum of Waterfront Commission), page 2053 5

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1107

JOHN MOODY, SR. and WILLIAM MURPHY,
Petitioners,
vs.
THE WATERFRONT COMMISSION OF
NEW YORK HARBOR,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

BRIEF FOR RESPONDENT IN OPPOSITION

Statement

Petitioners herein (William Murphy and John Moody, Sr.) seek a writ of certiorari to review a judgment of the Supreme Court of New Jersey, affirming contempt judgments of the Superior Court of New Jersey only insofar as such judgments adjudged petitioners guilty of civil contempt and ordered petitioners incarcerated until they answered certain specified questions and until they paid a fine of $50 each. The Supreme Court of New Jersey reversed these contempt judgments with directions for a new trial insofar as such judgments adjudged petitioners guilty of criminal contempt and sentenced petitioners to thirty days in jail.

The facts are as follows. The American Export Lines, Inc., which leases and operates waterfront piers and a terminal in Hoboken, New Jersey, employed one James H. Markley to be its Chief Security Officer in the port of New York, including Hoboken. The employment of Markley commenced May 16, 1960. Prior to the commencement of his employment with American Export Lines, Markley was an investigator for the Waterfront Commission and his principal assignment was to cover said piers and terminals of American Export Lines, Inc., in Hoboken. (Petitioners' printed Appendix in the court below, p. 6a)

On Monday, May 16, 1960, when the employment of Markley for American Export Lines commenced as aforesaid, a work stoppage began of the longshoremen and checkers employed by the American Export Lines in Hoboken, New Jersey. This work stoppage, except for the morning of Tuesday, May 17, 1960, continued through Friday, May 20, 1960. The work stoppage was in effect during the times that Markley, pursuant to his duties, was on the piers of the American Export Lines. Since May 20, 1960, when the work stoppage ended, Markley has not set foot on the piers of American Export Lines in Hoboken. (App., p. 6a)

Under the Waterfront Commission Act, the longshoremen and checkers who participated in this work stoppage were required to be and are registered by the Waterfront Commission. Also, under the Waterfront Commission Act, Markley, as Chief Security Officer of American Export Lines, must be and is licensed by the Waterfront Commission as a port watchman. (App., p. 6a)

The Commission instituted the instant investigation to determine whether the purpose of the work stoppage was illegally to coerce an employer (the American Export Lines) to limit the functions of, or to discharge, a licensed port watchman (James H. Markley) and further to determine whether any persons registered or licensed by the Commission were violating any provision of the Waterfront Commission Act by participating in such illegal coercion. (App., p. 7a)

In connection with such investigation, subpoenas of the Commission were duly served on May 18, 1960 upon petitioner William Murphy, the business agent of Local No. 2 of the International Longshoremen's Association, representing longshoremen in Hoboken, New Jersey, and upon petitioner John Moody, Sr., organizer for the ILA in the State of New Jersey. Both Murphy and Moody appeared at the offices of the Commission in response to these subpoenas on the afternoon of May 19, 1960. (App., p. 7a)

Moody, after giving his name and address, testified that he was a union official and refused to answer any other questions. Murphy testified that he was business agent of Local No. 2 and represented members of his local working at the American Export Piers in Hoboken. He stated that he knew the pier did not work on Monday [May 16, 1960] and that it was common knowledge for the previous ten days that things were not normal at Piers A, B, and C, Hoboken [American Export Lines Piers]. Murphy then refused to answer whether this condition was related to the appointment of Markley as Chief Security Officer and refused to answer any further questions. (App., p. 7a)

Thereupon, the Commission instituted contempt proceedings in the Superior Court of New Jersey, Hudson County, which, by judgment dated June 20, 1960, adjudged Murphy and Moody guilty of civil contempt and ordered that they be fined $50 each and that they be incarcerated until they obeyed the Commission subpoenas. (App., p. 8a) The judgment of contempt against Murphy and Moody was affirmed on May 22, 1961 by the Supreme Court of New

Jersey and this Court dismissed petitioners' appeal and denied their petition for certiorari. *In re Application of Waterfront Commission*, 35 N. J. 62 (1961), appeal dism'd and cert. den., 368 U. S. 32.

In their appearance before the Commission in May, 1960, both Moody and Murphy specifically stated that they were not refusing to testify upon the ground of self-incrimination. (p. 8a) Rather, as reflected in the opinion of the Supreme Court of New Jersey (35 N. J. 62; Petition, pp. 65a-80a), petitioners argued in the courts that the Commission's investigation was unlawful and unauthorized because it allegedly was violative of the lawful right to strike and because it allegedly was also in conflict with and therefore preempted by the federal Labor Management Relations Act.

Upon remand, petitioners, despite the affirmance of the civil contempt judgment, persisted in their refusal to testify, now claiming for the first time, among numerous other grounds, the privilege against self-incrimination. (App., p. 9a) The Superior Court held that petitioners had purged themselves of contempt by invoking the privilege; however, the Superior Court further ruled that the Commission's subpoenas were still in force and effect and directed petitioners to appear at the offices of the Commission pursuant to the subpoenas. (App., pp. 11a-12a) Pursuant to the provisions of Section 5-b(5) of the Waterfront Commission Act (N.J.S.A. 32: 23-86; App., pp. 10a-11a), the Commission conferred petitioners with immunity from prosecution and directed them to testify. (App., p. 12a) Notwithstanding such grant of immunity from prosecution, petitioners again refused to testify upon multifarious grounds, one of which was that the Commission's grant of immunity extended only to state, and not to federal, crimes. (App., pp. 74a-75a, 96a-97a)

The Commission thereupon instituted the second and instant contempt proceeding against petitioners to have them adjudged in both civil and criminal contempt. By judgments filed December 4, 1961, the Superior Court of New Jersey adjudged petitioners to be guilty of both civil and criminal contempt. The judgments ordered that the petitioners be incarcerated until they answer certain questions specified in the judgments and further fined defendants $50 each and sentenced defendants to 30 days in jail. (App., pp. 250a-257a) Upon appeal, the Supreme Court of New Jersey affirmed these second contempt judgments insofar as they held petitioners guilty of civil contempt and reversed the contempt judgments insofar as they held petitioners guilty of criminal contempt upon the ground that the Superior Court should not have denied petitioners the opportunity to present evidence upon the question of their criminal contempt. (Pet., pp. 35a, 97a-98a)

REASONS FOR DENYING THE WRIT

I

Petitioners did not have a constitutional right to refuse to testify upon the ground that the Commission's grant of immunity from prosecution extended only to state, and not to federal, crimes.

1. Petitioners assert that they had a constitutional right to refuse to testify in the Commission's investigation because the Commission's grant of immunity from prosecution extended only to state, and not to federal, crimes. Section 5-b(5) of the Waterfront Commission Act, pursuant to which petitioners were granted immunity from prosecution (Pet., pp. 109a-110a), was enacted in 1956 in New Jersey (1956 Laws of New Jersey, c. 194) and in 1957 in New York (1957 Laws of New York, c. 188) and is expressly patterned after, and substantially identical to, Section 2447 of the New York Penal Law. (See Commission's Legislative Memorandum, McKinney's 1957 Session

Laws of New York, p. 2053.) In *Knapp* v. *Schweitzer*, 357 U. S. 371, this Court sustained the constitutional validity of the grant of immunity from prosecution pursuant to Section 2447 of the New York Penal Law against the same contention, as here, that no immunity from federal prosecution had been conferred. Hence, petitioners in effect request this Court to review the selfsame statute and question as were recently involved in *Knapp*.

Petitioners recognize that *Knapp* stands foursquare against them. Petitioners contend, however, that this Court's decision in *Mapp* v. *Ohio*, 367 U. S. 643, presages the overruling of *Feldman* v. *United States*, 322 U. S. 487 (permitting use in a federal criminal trial of evidence obtained pursuant to a state grant of immunity), and that the overruling of *Feldman* foreshadows, in turn, the demise of *Knapp*. But even assuming for the purposes of discussion the possible overruling of *Feldman*, which is one of the links in petitioners' highly attenuated argument, this would militate against, rather than for, the grant of certiorari here. For in such event a witness could not claim fear of federal prosecution as a basis for his refusal to testify. Further, the question in *Feldman* is not even involved here. The time to reach that question is *when and if* petitioners' testimony is used against them in a subsequent federal prosecution.

2. As a reason for issuance of certiorari herein, petitioners assert throughout the petition that there was cooperation between the Commission and federal agencies in the instant investigation. (Pet., pp. 4-5, 21-22) However, this is no more than an *ipse dixit* by petitioners, for there is nothing in the record whatsoever to support these completely conclusory and unsupported assertions of such cooperation. Here, as in *Knapp*, "the record before us is barren of evidence that the State was used as an instrument of federal prosecution or investigation". (357 U. S. 371, 380) There is not involved herein any of the numerous

elements of federal-state cooperation which were present in *Mills* v. *State of Louisiana,* 360 U. S. 230, where, notwithstanding such cooperation, this Court sustained the state grant of immunity from state prosecution. Indeed, there is not even present here, as there was in *Knapp,* the fact "that a federal prosecuting attorney announced his intention of cooperating with state officials in the prosecution of cases in a general field of criminal law [involved therein]". (357 U. S. 371, 380)

Nor does it lie in petitioners' mouths to claim that the denial of their motion for discovery prevented them from proving the possible existence of cooperation between the Commission and federal agencies. Plainly, a witness in a state investigation has no federal right to fish through the files of the state investigating agency, and to interrogate state officials, in the hope that perhaps he may happen upon some evidence of such cooperation.

3. Another basis for petitioners' claim that it was constitutionally required to grant them immunity from federal prosecution is the contention in effect that the Commission, for present purposes, is a federal agency because it was created by an interstate compact approved by Congress. (Pet., p. 22) However, beyond the granting of consent to the original Compact, the federal government has had no part whatever in the creation, maintenance or operation of the Commission. In fact, Congress, in approving the Compact, expressly gave its approval to supplementary *state* legislation in accord with the objectives of the Compact (Act of August 12, 1953, 67 Stat. 541, c. 407), a "provision in the consent by Congress to a compact . . . so extraordinary as to be unique in the history of compacts". *DeVeau* v. *Braisted,* 363 U. S. 144, 154.

The law in any event is established that Congressional consent to an interstate compact does not constitute the agency created thereunder a federal instrumentality. E.g., *Hinderlider* v. *La Plata River Co.*, 304 U. S. 92 (interstate compact not a treaty or statute of United States within meaning of statute defining this Court's appellate jurisdiction); *Commissioner* v. *Shamberg's Estate*, 144 F.2d 998 (2nd Cir. 1944), *cert. den.*, 323 U. S. 792. (Port of New York Authority is a "political subdivision" of States of New York and New Jersey within meaning of Revenue Act excluding from taxation the interest on obligations of a state or political subdivision thereof.) And see this Court's decision this Term in *Cleary* v. *Bolger*, 371 U. S. 392, wherein an investigator for the Commission was held without discussion to be a state officer thereby rejecting, *sub silentio*, exactly the same argument as that now made by petitioners.

II.

Moreover, this is a singularly inappropriate case in which to consider a claim of federal incrimination upon a grant of state immunity because here that issue is seriously complicated by questions of waiver, estoppel and reasonableness.

1. As noted, in their original appearances before the Commission in this investigation, petitioners specifically stated that they were not claiming the privilege against self-incrimination. Rather, they contended in the first contempt proceedings against them not only that their conduct was innocent and lawful but that their conduct was actually protected by federal labor legislation. Then, after the court below (the Supreme Court of New Jersey) affirmed the original civil contempt judgments and this Court denied review, petitioners, in a cynical *volte face*, proceeded to claim the privilege against the self-incrimination.

The court below rejected the Commission's contention that petitioners had waived the privilege against self-incrimination. The court below held that this contention was not available to the Commission because the Commission had not made this objection in the court of first instance (the Superior Court) and further that the Commission had recognized petitioners' right to claim the privilege. (Pet., p. 13a)

This decision by the court below is of course not conclusive here. For the Commission, as the respondent herein, may—and would upon a grant of certiorari—urge any ground that appears in the record in support of the judgment herein. E.g., *United States* v. *American Ry. Express Co.*, 265 U. S. 425, 435-436; *Langnes* v. *Green*, 282 U. S. 531, 538-539. An "appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." *United States* v. *American Ry. Express Co., supra,* at page 435. Indeed, this Court has entertained an argument in support of the judgment that was made for the first time upon oral argument in this Court. *Marshall* v. *Pletz,* 317 U. S. 383, 389-390.

Further, the question of waiver is itself a federal question cognizable by this Court. For "This Court will review or independently determine all questions on which a federal right is necessarily dependent." *United States* v. *Pink,* 315 U. S. 203, 217. E.g., *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173 (whether patent licensee is estopped from challenging price fixing clause in agreement as being invalid under the Sherman Anti-Trust Act is a federal question). Plainly, the question of when and in what circumstances a claim of federal incrimination based upon the United States Constitution may be asserted is a question that requires uniform treatment and cannot properly be subject to the vagaries of local law.

And while we shall not burden this brief in opposition with an argument *in extenso* upon the point, a review of the record herein will show that the Commission never recognized a right in petitioners to assert a claim of *federal* incrimination. The Commission did recognize during petitioners' first appearance upon the remand that petitioners could claim the privilege against self-incrimination, there being at that time no explicit claim by petitioners that they feared federal incrimination, and the Commission adjourned the investigation for the purpose of determining whether to obviate the plea by granting petitioners immunity from *state* prosecution. (App., pp. 29a-33a, 36a, 43a-52a) Subsequently, the Commission did confer immunity upon petitioners and when petitioners indicated for the first time that they were relying upon federal incrimination, the Commission specifically advised petitioners that the grant of immunity did not extend to federal crimes (App., pp. 74a-75a; 96a-97a) and that they would be subject to contempt proceedings for their refusal to testify. (App. pp. 91a, 103a) The Commission accordingly never recognized a claim of *federal* incrimination by petitioners as a valid plea.

2. In addition to having waived the privilege against self-incrimination, petitioners are estopped from claiming the privilege. As noted, petitioners contested the first contempt proceedings against them upon the ground that not only was their conduct innocent and lawful but that the Commission's investigation could not be sustained because it interfered with conduct affirmatively protected by federal labor legislation. In their brief (p. 3) in the court below, petitioners represented:

> "During the period commencing May 16 and ending May 25, 1960, the Commission does not allege, nor

> were there any acts of violence committed; there were no picket, picketing, or demonstrations; no person was assaulted or intimidated; no crimes were committed; no property was damaged; the streets were not blocked or obstructed and traffic in and out of the piers was not impeded."

The court below, however, ruled against the Commission on the question of estoppel upon the ground that the Commission had not asserted this objection in the court of first instance, that is, the Superior Court. (Pet., p. 13a)

However that may be and entirely apart from what happened below, petitioners are estopped *in this Court* from claiming federal incrimination. For in the Jurisdictional Statement (pp. 22-23) filed by petitioners with this Court in the first contempt proceeding, petitioners represented:

> "The question here presented, as to the constitutionality of the Compact as construed and applied in the decision below, is substantial, then, in the most weighty degree. The question is not governed by the DeVeau case [*DeVeau* v. *Braisted,* 363 U. S. 144], as above shown, for here there is not brought into play, either factually or analytically, the direct crime-prevention features which were decisive in DeVeau; here, rather, the whole realistic brunt of the state police power is upon a traditional type of labor-dispute situation which is not shown by even remotely adequate record proofs to partake of a 'crime' element."

Having sought review in this Court upon the ground that the Commission was interfering with "a traditional type of labor-dispute situation which is not shown by even remotely adequate record proofs to partake of a 'crime' element", petitioners are now estopped from seeking review in this Court upon ground that they fear federal incrimination. Cf. *National Association for the Advance-*

ment of Colored People v. *Alabama,* 360 U. S. 240 (in contempt proceeding against NAACP, where this Court's prior decision was based on premise that NAACP had complied with court order to produce documents except as to its membership lists, which was not denied by the State of Alabama, the State of Alabama was bound by this position and could not subsequently claim that the NAACP had failed in other respects to comply with the court order). *Scarano* v. *Central R. Co. of New Jersey,* 203 F.2d 510, 512-13 (3rd Cir. 1953), (railroad employee who received large settlement after personal injury trial in which he claimed permanent disablement was estopped from subsequently suing for reinstatement to his job with railroad).

3. Further, there is no reasonable basis for petitioners' claim that they fear federal incrimination. The Superior Court, who saw and heard petitioners testify on the question of their claimed fear of federal incrimination, expressed doubts as to the sincerity of petitioners' claimed fear. (Pet., p. 11a) However, the court below (the Supreme Court) stated that it was unnecessary to decide this question in view of its conclusion that the plea of federal incrimination was not legally available to petitioners. (Pet., p. 25a)

Again, this is a ground which the Commission may assert in this Court in support of the instant judgments and this issue is itself a federal question cognizable by this Court. Petitioners' claim that they fear federal incrimination does not of course bind anyone. The "protection [the privilege against self-incrimination] must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. Mason v. United States, 1917, 244 U. S. 362, 365, 37 S. Ct. 621, 622, 61 L. Ed. 1198, and cases cited. The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, Rogers v. United States, 1951, 340 U. S. 367, 71 S. Ct. 438, and to require him to answer it if 'it clearly appears to the court that he is mistaken'. Temple v. Commonwealth, 1880, 75 Va. 892, 899." *Hoffman* v. *United States,* 341 U. S. 479, 486. Here, as the record makes clear, petitioners have been something less than completely candid in their claims in these contempt proceedings.

Petitioners assert that they fear incrimination under federal statutes punishing theft from interstate commerce. Certainly, it taxes credulity that a work stoppage to prevent a certain person from becoming the Chief Security Officer of the American Export Lines in the port of New York was instituted simply in order to commit a theft. Petitioners also claim that they fear incrimination under such federal statutes as the Civil Rights Law, the Anti-Trust Laws, and the Hobbs Anti-Racketeering Act. These statutes are clearly inapplicable to the instant facts on their face. Moreover, at least some of these statutes are mutually exclusive; it is difficult to conceive, to say the least, how petitioners can honestly fear incrimination under both a federal law prohibiting theft from interstate commerce or extortion and the Anti-Trust Laws. Plainly, in this litigation, petitioners are simply thrashing about for a federal statute upon which they can hang their claim of federal incrimination without regard whatever for the truth.

4. Petitioners seek certiorari mainly upon the contention that they had a constitutional right to refuse to testify because the Commission's grant of immunity did not extend to federal crimes. But before this issue is even reached, substantial questions involving waiver, estoppel and the reasonableness of the claimed fear of federal in-

crimination must first be decided. These complicating questions make this case singularly inappropriate for consideration upon certiorari.

III

Petitioners' subsidiary contentions respecting the within civil contempt judgments (that they were entitled to a jury trial; that they were entitled to a trial on the issue of their good faith; that they were entitled to know what information was contained in the Commission's files; and that they were denied the equal protection of the laws) are plainly unsubstantial.

In addition to petitioners' main contention that they had a constitutional right to refuse to testify because the Commission's grant of immunity did not extend to federal crimes, petitioners make several subsidiary contentions in support of their petition for certiorari. These subsidiary contentions are plainly unsubstantial.

1. Petitioners contend that, before they could be adjudged guilty of civil contempt, it was constitutionally required that they be given a jury trial. (Pet., pp. 6, 26) In *Green* v. *United States*, 356 U. S. 165, 183, sustaining a *federal criminal* contempt conviction in the absence of trial by jury, this Court stated: "The statements of this Court in a long and unbroken line of decisions involving contempts ranging from misbehavior in court to disobedience of court orders establish beyond peradventure that criminal contempts are not subject to jury trial as a matter of constitutional right." It accordingly cannot be reasonably contended that jury trials are constitutionally required in *state civil* contempts.

2. Petitioners contend that they were entitled to a trial upon the issue of their good faith. (Pet., p. 26) Petitioners assert that "they had no contemptuous intent and that

their resistance to the Waterfront Commission's interrogation was grounded in good faith upon valid legal considerations". (Pet., p. 5) Conclusively against petitioners, however, is this Court's decision in *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187, where it was held that good faith is not a defense in a federal civil contempt proceeding for violation of an injunction order. Indeed, this Court has held that the only intent at issue in a criminal prosecution for contempt of Congress, pursuant to 2 U.S.C., § 192, making it a misdemeanor "willfully" to refuse to answer questions or to produce papers, is whether such refusal to obey was deliberate, that is, not inadvertent. *Sinclair* v. *United States*, 279 U. S. 263, 299 (good faith reliance upon advice of competent counsel not a defense since moral turpitude is not involved). Here, of course, petitioners' refusal to testify was deliberate. Besides, petitioners, who are free on bond pending this Court's decision, may at any time purge themselves of civil contempt by testifying and it is difficult to see what good faith claim petitioners could make for continuing in their refusal to testify if this Court should refuse review.

3. Petitioners contend that they were unable to make a rational judgment with respect to the necessity and advisability of claiming the privilege against self-incrimination without being apprised of "the Commission's damaging information against them (if any) and [without] confrontation and cross-examination of accusatory witnesses". (Pet., p. 6) This surely is a novel contention. As the court below cogently stated respecting this argument: "We know of no rule, constitutional or otherwise, which provides that when, as here, the subject matter of the inquiry and the pertinency thereto of questions have been made clear to a witness, he is entitled to be given further information before deciding whether to exercise his privilege against self-incrimination. If the Commission were thus compelled to disclose the contents of its files, then the

whole investigative process would be subject to scrutiny before the investigation had even gotten under way, and in most cases the investigation would be thwarted''. (Pet., p. 33a) And in this Court's decision in *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 213, which rejected the argument that a hearing on the question of coverage was necessary before judicial enforcement of subpoenas in an administrative investigation of violations of the Fair Labor Standards Act, the Court stated: "[This] view if accepted would stop much if not all of investigation in the public interest at the threshold of inquiry and, in the case of the Administrator, is designedly avowed to do so. This would render substantially impossible his effective discharge of the duties of investigation and enforcement which Congress has placed upon him."

4. Finally, one of the questions tendered by the instant petition for certiorari is whether petitioners were discriminatorily denied, in violation of the equal protection of the law, the benefits of the New Jersey statute defining the privilege against self-incrimination to include federal crimes. (Pet., pp. 6, 114a) The court below held as a matter of general statutory construction that this statute, which was recently enacted in 1960, was not intended to be applicable in a situation where, as here, the witness had been granted immunity pursuant to the explicit immunity provisions of the Waterfront Commission Act. Since this decision involves a question of general statutory construction which will have uniform application, and is in no wise confined to petitioners, no question of the equal protection of the law is presented.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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Dated: June 14, 1963.

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No. [redacted] 138

IN THE

Supreme Court of the United States

October Term, 1962

JOHN MOODY, SR. and WILLIAM MURPHY,
Petitioners,

—v.—

THE WATERFRONT COMMISSION OF
NEW YORK HARBOR,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEW JERSEY

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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32

CASE PRESS INC., 421 Hudson St., N. Y.—ORegon 5-4540

INDEX

PAGE

I. "Waiver" and "estoppel" as supposedly rendering this case unsuitable for certiorari on the issues as to failure to protect petitioners against federal incrimination 1

II. The issues as to Knapp v. Schweitzer, 357 U. S. 371 11

III. The issue of the reasonableness of petitioners' fear of federal incrimination 13

IV. The issue of equal protection 14

V. Other misstatements in respondents' brief in opposition 15

CONCLUSION 16

AUTHORITIES CITED

Cases

Brown v. United States, 356 U. S. 148 7

Feldman v. United States, 322 U. S. 487 .... 12, 13

Hernandez v. Texas, 347 U. S. 475 14

Knapp v. Schweitzer, 357 U. S. 371 .... 11, 13

Malloy v. Hogan, No. 1031 (June 3, 1963) 11

Pembina Consolidated Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181 14

Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362 14

United States v. Miranti, 253 F. 2d 135 (C. A. 2 1958) 9

Statutes

Fifth Amendment 11

Fourteenth Amendment 14

Supreme Court of the United States

October Term, 1962

No. 1107

John Moody, Sr. and William Murphy,

Petitioners,

—v.—

The Waterfront Commission of New York Harbor,

Respondents.

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

I. "Waiver" and "estoppel" as supposedly rendering this case unsuitable for certiorari on the issues as to failure to protect petitioners against federal incrimination.

The respondent Waterfront Commission argues (Br. in Opp. pp. 8 *et seq.*) that "this is a singularly inappropriate case in which to consider a claim of federal incrimination upon a grant of state immunity because here that issue is seriously complicated by questions of waiver, estoppel and reasonableness".

(The issue of "reasonableness", i.e., whether petitioners had reason to fear federal incrimination, is treated under a separate heading *infra.*)

The Court below rejected the respondent Commission's contentions that the petitioners had waived the privilege against self-incrimination or were estopped in that regard (Pet. 13a). The respondent Commission in its brief in opposition herein (pp. 9, 11) tries to minimize the significance of this ruling by the Supreme Court of New Jersey. The actual language of the Court below on this point was (Pet. 13a):

> "* * * The Commission recognized the defendants' right to assert the privilege at its hearing of October 3, 1961, and the trial court on October 4, 1961 also recognized their right when it purged them of their original contempt. Moreover, at its hearing on October 27, 1961, the Commission clearly recognized the defendants' right to assert the privilege when it granted them immunity against prosecution. Finally, the contentions of waiver and estoppel were never raised by the Commission in the court below and therefore it may not raise them for the first time in this court."

The above rejection, by the Court below, of the Commission's arguments as to waiver and estoppel occurred in the face of the intensest sort of effort by the Commission in that Court to prevail on those issues. At p. 55 of the Commission's brief in the Court below the Commission went so far as to make the following serious accusation against the within petitioners Murphy and Moody:

> "* * * clearly, defendants do not feel bound by any statement they may have made in any other Court or at any other stage of the Commission's contempt proceedings."

Before this Court the Commission levels a similar accusation, stating (Br. in Opp. p. 8):

> "As noted, in their original appearances before the Commission in this investigation, petitioners specifically stated that they were not claiming the privilege against self-incrimination. Rather, they contended in the first contempt proceedings against them not only that their conduct was innocent and lawful but that their conduct was actually protected by federal labor legislation. Then, after the court below (the Supreme Court of New Jersey) affirmed the original civil contempt judgments and this Court denied review, petitioners, in a cynical *volte face*, proceeded to claim the privilege against the self-incrimination."

Because these accusations directly affect the merits of our certiorari petition, we are obliged to reply to them. We shall therefore now show that while the respondent Commission thus accuses the petitioners Murphy and Moody in effect of resorting to an unscrupulously opportunistic litigation strategy, it is actually the Commission itself that is guilty of exactly that sort of strategy in its contentions of "waiver" and "estoppel".

Whereas the Commission accuses Murphy and Moody of supposedly improper alleged changes of position in their refusal to testify (*i.e.* that they improperly changed from the ground of N.L.R.B. preemption or lack-of-jurisdiction in the prior contempt case to the self-incrimination ground in the second contempt case), what the Commission itself has done is that it has switched from (1) the ground that it possessed jurisdiction because the work stoppage was not a labor dispute but a *criminal* enterprise within the Commission's jurisdiction over waterfront crime, to

(2) the ground that Murphy and Moody are now insincere in claiming that they believe the Commission meant what it said when it spoke of waterfront crime as being the essence of the prior stage of this case.

In other words, when the Commission wanted to win in the courts the first round of this controversy arising from the original May 1960 interrogation of Murphy and Moody, the Commission was all hot and earnest over how crucial a "crime" case this is—because "crime" emphasis was necessary to win in the courts against Murphy's and Moody's N.L.R.B. jurisdiction argument. But now, in the instant second round of the controversy, arising from the purported immunity-conferrals of October 1961, where in order to win it becomes necessary for the Commission to pooh-pooh the "crime" phase so as to discredit Murphy's and Moody's fear of federal incrimination, the Commission strives to convince the courts that Murphy and Moody are engaging in "a cynical *volte face*" when they accept the Commission's own former trumpetings of the waterfront crime issue.

At the very first hearing before the Commission, in May, 1960, before any contempt proceedings had been brought, the Commission spoke exclusively of a "work stoppage", expressly stated that it did not know whether there was "anything wrong", and expressed its ignorance as to whether any "crime" element was involved. *E.g.*, DD34a-35a.*

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* "DD a" refers to the printed "Appendix to Brief for Appellants" in the Superior Court of New Jersey, Appellate Division, which served also as such "Appendix" in the Supreme Court of New Jersey in the appeal from the first contempt judgment—which culminated in the dismissal by this Court of the prior appeal to this Court (368 U. S. 32). Nine extra copies of the latter Appendix were filed with our Jurisdictional Statement in this Court in the aforesaid prior appeal.

Is it surprising that, in those circumstances, the witnesses Murphy and Moody put their entire thrust on the N.L.R.B. jurisdiction issue and refrained from incurring the odium of pleading the privilege against self incrimination? Then, within literally hours after those initial events in May, 1960, the Commission was in court with elaborately prepared papers to hold the witnesses for contempt on the ground that the Commission's *crime-preventive* powers were at stake (DD1a to 12a). And then, throughout the ensuing stages of the prior contempt litigation, the Commission played this "crime" theme to the hilt. See the Commission's printed Brief and Appendix in the Court below in the prior appeal (Docket No. A-790-59), pp. 2-14, especially pp. 13-14. See, also, the Commission's "Motion To Dismiss Appeal" in this Court, October Term 1961, No. 362, pp. 4, 8-9. See, also, the opinions of Judge JOSEPH L. SMITH and of the Supreme Court of New Jersey in the prior proceeding, printed in full in the Appendix to our Jurisdictional Statement in this Court in the prior proceeding (the former opinion of the Court below is reported at 35 N. J. 62); both of those opinions are replete with the "crime" theme that the Commission had so strenuously urged upon those Courts.

Let us examine a little further into the consequences of these gyrations by the Commission. Suppose it is true that the Commission now sincerely believes that Murphy and Moody "waived" the privilege or are "estopped" from asserting it as of the time of the hearings in October, 1961. Why, then, did not the Commission then and there (in October 1961) move for contempt on such grounds of waiver and estoppel; why did the Commission instead "process" Murphy and Moody for enmeshment in the "immunity" net; and why did the Commission defer its second contempt effort until it had first closed this net around the victims? If the Commission had taken the proper course (proper, that is, as judged by the Commission's own present claimed sincere professions to this Court on the issues of waiver and estoppel), *i.e.*, the course of moving for contempt in October 1961 on the grounds of waiver and estoppel alone and without the imported addition of "immunity", the defendants would at least have had explicit apprisal *for trial purposes* that they were thus facing contentions of waiver and estoppel.

This opportunism in the Commission's tactics serves to accentuate more starkly perhaps than anything else in the case an important area of due process aggrievement which we assert in this case, namely, the utter inadequacy of the so-called "trial" for contempt. For what we now see is not only that that "trial" was constitutionally nugatory for all of the reasons asserted in our Petition, but that it was additionally defective because it did not even pass at all ("trial"-wise or otherwise) upon the issues of waiver and estoppel which the Commission now tenders to this Court as the very head and front of the Commission's stand in this certiorari proceeding.

Of course, the real factors which have impelled the Commission to go through all of these twistings and turnings include not only the factor of the Commission's sheer desire to win at any price, but they include also the stubborn truth that the Trial Court itself, on October 4, 1961, formally adjudged that Murphy and Moody were entitled to plead the privilege against self incrimination and that their having so pleaded had the effect of purging them of the original contempt (D54a).

Were the situation not so aggrieving, it would be simply preposterous. A supposedly responsible Governmental body, enjoying extraordinary powers as the official trustee of two state sovereignties with the formal blessing of the Congress of the entire country, accuses citizens of repudiating an alleged "waiver" and "estoppel" when this same body itself expressly and repeatedly waived those supposed "waivers" and estopped itself from invoking those supposed estoppels.

Apart from the general considerations above suggested, the Commission's stand on the supposed issues of waiver and estoppel is legally unsound on the record facts of this case in any event.

This Court has declared that a witness compelled to testify has no occasion to invoke the privilege until testimony sought to be elicited will in fact tend to incriminate him. *Brown* v. *United States,* 356 U. S. 148. As seen, there was no occasion for Murphy and Moody to plead self incrimination in May, 1960. But at the second interrogation (October, 1961), the Commission's "crime" theme had come to occupy the forefront of the entire picture.

We have above referred to the fact that after the petitioners invoked the privilege on October 3, 1961 before the Commission, the Trial Judge adjudged that the defendants had purged themselves of the prior contempt judgment. The Trial Judge was at pains to make it explicit and emphatic that this adjudication of purgation marked an absolute closing off of the entire prior contempt proceeding, and that the Commission's announcement (on October 4, 1961) that it contemplated "immunity" proceedings would give rise to an entirely separate and distinct proceeding **(D54a)**:

> "The Court: The Court has heard the argument on the question now presented to the Court as to whether or not these defendants have purged themselves of the contempt on which they have previously been found guilty.
>
> This Court is satisfied that they have purged themselves of that contempt. They have obeyed the subpoena, appeared for examination, they have been examined by the Commission, and the record of the transcript of the testimony, as read to this Court, which is a part of this record, indicates that their refusal to answer was recognized as a proper ground and legal basis for their so refusing to answer those particular questions, as the record then stood, namely, on the basis of their constitutional right that it might tend to incriminate them. The Examiner so states many, many times in the record that has been presented to me. The fine has been paid."
>
> * * * * *
>
> "* * * What is done then under this statute of immunity is *entirely separate and apart from what* this Court and the appellate courts have already passed upon. It is not a part of this proceeding * * *." [Italics added]

The separateness of the proceeding out of which the present contempt case arises—the immunity proceeding which came later in the month of October, 1961—is further conclusively shown by the fact that the prior contempt case was purely civil, whereas the instant contempt case was both civil and criminal, and was of course, again, based upon a new and separate interrogation of the defendants, an interrogation which moreover imported the wholly new and additional element of an immunity-conferral. (These last mentioned facts did not prevent the Commission's attorney from trying to make the Trial Court believe that there was no essential legal difference between the two respective contempt proceedings—D180a-D181a.)

It is elementary that, where such separate proceedings are involved, a witness in the subsequent proceeding may not be held to have waived his privilege by any of his testimony in the prior proceedings. *United States* v. *Miranti,* 253 F. 2d 135, 139 (C A. 2 1958), collecting the numerous authorities for this proposition.

It is submitted that the Commission's belated reliance on "waiver" and "estoppel" is not only unsound in law but reveals the fatal weakness of the Commission's entire case before this Court—*i.e.,* if the Commission felt itself secure on the true primary issues herein—*viz.,* the issues of adequate trial and ineffectual "immunity" for failure to cover federal incrimination—the Commission would not tender as its prime issues such frivolous contentions as those of waiver and estoppel on the present record.

Indeed, if the Commission deems the petitioners' use of the privilege nugatory because "waived" and "estopped", the very conferral of immunity to overbear the privilege loses all foundation in the record, and there was no jurisdiction in the Trial Court to entertain the instant contempt motions at all.

Mention should be made also of the respondent Commission's argument at pp. 10-11 of its brief in opposition to the effect that petitioners are "estopped" (as distinct from the "waiver" issue itself) by statements made in one of petitioners' State Court briefs and in our Jurisdictional Statement in this court in the prior contempt case.

First, as to the statement in the State Court brief just mentioned, aside from the fact that the Commission gives the impression that said brief was filed in the instant second contempt proceeding whereas in fact that brief was filed in the first contempt proceeding, the statement from that brief to which the Commission points (Br. in Opp. p. 10) deals only with the question of violence immediately attendant upon the work stoppage itself, not with any question of crime in the *purpose* of the work stoppage, i.e., not with any question of a criminal purpose to get rid of a port security officer so that thefts could be perpetrated. *Second*, as regards the passage in our prior Jurisdictional Statement to which the Commission points (Br. in Opp. p. 11), all we were there saying was that (as we believe has been amply demonstrated to be true) the record in the original interrogation of Murphy and Moody did not establish that the Commission's claim of jurisdiction rested upon "crime" elements in the situation as distinct from sheer "labor dispute" elements.

And, once again, the Commission's over-and-over repeated idea in its Brief in Opposition (see especially pp. 8-11) that petitioners' emphasis upon the N.L.R.B. preemption issue rather than on self-incrimination in the first interrogation and in the first contempt proceeding precluded petitioners from invoking the privilege against self-incrimination at the subsequent interrogations and in the instant second contempt proceeding, completely loses sight of the fact that two separate and distinct proceedings, substantially separated from each other in time, are here involved.

(In conclusion on this point as to "waiver" and "estoppel" we note another instance in the Brief in Opposition where the Commission has tried to telescope the two separate contempt proceedings by a smoothly inexact presentation of the record facts. (See Br. in Opp. p. 4 where the Commission, in supposedly describing what happened following the remand after the first contempt proceeding, omits to mention that the petitioners were subjected to a wholly renewed interrogation.)

II. The issues as to *Knapp* v. *Schweitzer*, 357 U. S. 371.

At the time of the filing of our petition for *certiorari* and of our supplement to said petition, this Court had not yet granted *certiorari* in *Malloy* v. *Hogan*, No. 1031 (June 3, 1963). Respondents' brief in opposition does not mention this development. We respectfully note that the issue which this Court will be called upon to consider in the *Malloy* certiorari—*viz.*, whether the Fifth Amendment privilege against self-incrimination is applicable in State proceedings *via* the Fourteenth Amendment—bears an integral relation to the issue presented by the instant petition as to the effectiveness of a State grant of immunity which does not extend to federal incrimination.

Respondents' Brief in Opposition misstates our position on the last-mentioned issue in two important respects: (1) At p. 6 of their Brief respondents incorrectly state that "petitioners assert throughout the petition that there was cooperation between the Commission and Federal agencies in the instant investigation", for which respondents cite pp. 4-5 and 21-22 of our Petition. We made no such assertions in our Petition. Rather, we urged that the situation in its nature—the presence of the element of inter-state and foreign waterfront crime, and the quasi-federal character of the respondent Commission—raised an intrinsic and probable factor of federal-state cooperation for the federal incrimination of persons in the position in which the Commission is pleased to place the petitioners; and, above all, we contended that we were entitled to discovery for the purpose of eliciting the facts as to such federal-state cooperation. (2) Respondents incorrectly state (Br. in Opp. p. 7) that "another basis for petitioners' claim that it was constitutionally required to grant them immunity from federal prosecution is the contention in effect that the Commission, for present purposes, is a Federal agency, because it was created by an inter-state compact approved by Congress", for which respondents cite p. 22 of our petition; and then respondents proceed, with a considerable show of truistic scholarship, to disprove this supposed contention of ours. We made no such contention, and we are obliged to repudiate respondents' efforts thus once again to depict our position in frivolous terms. What we actually said about the Commission's "federal character" appears at p. 22 of our petition.

Respondents also argue (Br. in Opp. p. 6) that the overruling of *Feldman* v. *United States,* 322 U. S. 487 (permitting use in a federal criminal trial of evidence obtained pursuant to a state grant of immunity) "would militate against, rather than for, the grant of certiorari here. For in such event a witness could not claim fear of federal prosecution as a basis for his refusal to testify." Respondents' logic here is so topsy-turvy that logical refutation thereof is a bit tiresome. The real point is that in the present status of the law, with *Feldman* on the books, petitioners do face federal incrimination *per* evidence which the Commission wants to extract from the within petitioners under the state grant of "immunity". If *Feldman* were overruled *Knapp* itself would fall, and in the resulting altered status of the law the entire posture of the respective rights of the parties in the instant case would be so fundamentally transformed that, surely, the within judgments of contempt could not stand.

III. The issue of the reasonableness of petitioners' fear of federal incrimination.

Respondents' argument on this issue (Br. in Opp. pp. 12-13) consists of a reference to the Trial Court's attitude on the point (which had nothing to do with the question of whether as a matter of law waterfront thefts could give rise to federal prosecution, an observation that the Court below never reached the question, a couple of quotations from familiar decisions of this Court which are of a purely generalized doctrinal sort that does not conclude the instant issue, and an attempt to minimize or ridicule the idea that waterfront theft is an issuable item in this case.

To hear the Commission in its representations to this Court one would scarcely suspect that the very *raison d'etre* of the Waterfront Commission, as the Commission never tires of reminding everyone (except when, as now, official opportunism dictates otherwise), is the prevention of thefts and pilferages by racketeering waterfront elements. Suddenly, for the purposes of this appeal, the Waterfront Commission becomes altogether modest about this theft-prevention role.* This kind of argumentation, to use the Commission's phrase, "taxes credulity," in the face of the entire history of these contempt cases, where repeatedly and insistently the Commission has dinned into the ears of every judicial tribunal that has sat in these cases the ominous theme of waterfront thefts in connection with the exclusion of faithful watchmen like Markley.

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* Contrast, for example, the sensationalistic feature story in the New York Times of Sunday November 26, 1961, p. 14S, entitled "'Flash' Pier Raids Aim At Pilferers"—a highly dramatized description of nocturnal heroics by the Commission's agents, including personal participation by its executive Director, Mr. Ambrose.

It is therefore submitted that the Commission has wholly failed to negate the petitioners' reasonable fear of federal incrimination as to this prime federal prosecutive area relating to waterfront thefts.

IV. The issue of equal protection.

Respondents' only reply to the question tendered by our petition as to whether it is a violation of Fourteenth Amendment equal protection to deny to persons interrogated by the Waterfront Commission the benefit of the general New Jersey evidence statute which defines self-incrimination to include the federal incrimination, is that "Since this * * * involves a question of general statutory construction which will have uniform application, and is in no wise confined to petitioners, no question of the equal protection of the law is presented"—for which respondents cite no authority. We were not aware that there was any dearth of authority for the proposition that the equal protection clause was designed to prevent not only persons but *classes* from being singled out as a special subject of discriminatory legislation. E.g., *Pembina Consolidated Silver Min. & Mill. Co.* v. *Pennsylvania,* 125 U. S. 181; *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362; *Hernandez* v. *Texas,* 347 U. S. 475.

V. Other misstatements in respondents' brief in opposition.

On page 2 of their brief respondents state, "Since May 20, 1960, when the work stoppage ended, Markley has not set foot on the piers of American Export Lines in Hoboken. (App., p. 6a)" The record does not support this statement. Respondents' citation to "App., p. 6a" is to its motion papers dated November 1, 1961.

Another misstatement by respondents is their description of the ground of the decision below for reversal of the convictions of criminal contempt, respondents stating (Br. in Opp. p. 5) that this ground was "that the Superior Court should not have denied petitioners the opportunity to present evidence upon the question of their criminal contempt". The actual grounds of the aforesaid reversal were stated by the Court below as follows (Pet. 34a-35a):

> "However, we think that the judgments holding the defendants guilty of criminal contempt must be reversed. In *N. J. Dept. of Health* v. *Roselle*, 34 N. J. 331, 344 (1961), we expressed grave doubts whether a defendant's rights could be adequately protected in a 'double-barrelled proceeding,' where charges of both civil and criminal contempt are tried in a common hearing. Although the defendants did not specifically object to the dual aspects of the trial below, they did make known their desire to have an opportunity to introduce evidence on the question of intent to commit a criminal contempt. From our examination of the record, it appears that the defendants were exposed to criminal punishment without being afforded the opportunity to present evidence in their defense, if any, and in extenuation of the offenses charged and in mitigation of the penalties to be im-

posed. The trial court's refusal to hear any evidence, except for the limited purpose of pinpointing the areas of possible federal incrimination, denied the defendants the safeguards to which they were entitled as persons charged with criminal offenses. See *Cooke* v. *United States,* 267 U. S. 517, 537, 69 L. ed. 767, 774 (1924); *N. J. Dept. of Health* v. *Roselle, supra,* at 338-340."

We have called attention in this reply brief to respondents' imperfect handling of important items of fact because, frankly, we are in hopes that this Court will scrutinize respondents' presentation as one which is not deserving of any presumption of official fastidiousness.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1963

No. 138

WILLIAM MURPHY and JOHN MOODY, SR.,
Petitioners,

—v.—

THE WATERFRONT COMMISSION OF
NEW YORK HARBOR.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF NEW JERSEY

PETITIONERS' BRIEF

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TABLE OF CONTENTS

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statutes and Rules of Court Involved 8

Statement 11

Summary of Argument 22

ARGUMENT:

POINT I—A. The purported grants of immunity by the respondent Waterfront Commission in this case were invalid under the Fifth and Fourteenth Amendments (self-incrimination and due process of law) in view of the express exclusion of any grant of immunity against Federal incrimination, inasmuch as the situation in its nature so strongly bespoke the probability if not the virtual certainty of Federal-State collaboration to fight alleged waterfront crime, and inasmuch as petitioners' diligent and exhaustive requests for discovery and for trial testimony to elucidate such Federal-State collaboration were denied. These circumstances invalidate the purported grants of immunity simply on the basis of the reservation, in Knapp v. Schweitzer, 357 U.S. 371, as to proper cases which might arise where Federal-State collaboration in crime-enforcement should be present.

PAGE

B. In any event, this case presents a proper occasion for abrogation of the primary ruling in Knapp v. Schweitzer, approving a State grant of immunity which did not protect the witness against Federal prosecution.

C. Petitioners respectfully join in the contention by the petitioners in No. 110 at this Term (Malloy v. Hogan) that the Fifth Amendment privilege against self-incrimination should be held applicable to the States through the Fourteenth Amendment 34

Point II—Petitioners' conviction of what was rather incongruously termed "civil contempt", was in contravention of their Fourteenth Amendment rights of due process and fair trial 62

Point III—Petitioners have been denied the equal protection of the laws under the Fourteenth Amendment in that the rulings below deny to persons interrogated by the Waterfront Commission the benefit of the General New Jersey Evidence Statute which defines self-incrimination to include Federal incrimination 78

Point IV—Where "civil contempt" is for all practical purposes criminally punitive and substantially indissoluble from "criminal contempt", whether in a single intermingled proceeding or not, a new constitutional requirement of jury trial in "civil contempt" should be enunciated by this Court as a part of due process of law .. 83

Point V—If the Court should entertain petitioners' contention that they were entitled to fuller apprisal as to the factual basis of the Commission's interrogation on the question of

PAGE

"crime" versus "labor dispute", or if the Court should entertain the Commission's contention of waiver and estoppel of petitioners' privilege on the theory that petitioners believed no "crime" and only a "labor dispute" was involved, then the Court should also entertain and decide the question of whether the area of the Commission's interrogation in this case is preempted by the Federal Management Relations Act; and the Court should rule that such preemption does apply 86

POINT VI—Petitioners did not waive and they were not estopped from asserting their privilege against self-incrimination 94

CONCLUSION 104

APPENDIX A—Statutes and Rules of Court A-1

APPENDIX B—Defendants' Memorandum in Support of Motion for Bill of Particulars and Right to Submit Interrogatories A-10

AUTHORITIES CITED

Cases

Adamson v. California, 332 U.S. 46 .... 35, 38
Amos v. United States, 255 U.S. 313 104

Baider v. Local 470, International Teamsters, Etc., 400 Pa. 188, 161 A. 2d 343 (1960) 90
Board of Health, Weehawken Tp. v. N.Y. Central R. Co., 10 N.J. 284 (1952) 85
Bessette v. W. B. Conkey Co., 194 U.S. 324 84
Boyd v. United States, 116 U.S. 616 40
Bridges v. California, 314 U.S. 252 84
Brown v. United States, 356 U.S. 148 100

PAGE

Brown v. Walker, 161 U.S. 591 .... 23, 36
Byars v. United States, 273 U.S. 28 36

Clark v. United States, 289 U.S. 1 68
Cleary v. Bolger, 371 U.S. 392 49
Cooke v. United States, 267 U.S. 517 .... 29, 67, *passim*
Conley v. United States, 59 F. 2d 929 (C. C. A. 8 1932) 51
Counselman v. Hitchcock, 122 U.S. 547 81
Cudahy Packing Co. v. Holland, 315 U. S. 357 61

Davis v. Silverberg, 14 Misc. 2d 744, 155 N.Y.S. 2d 321 (S. Ct. 1956) 90
DeVeau v. Braisted, 363 U.S. 144 .... 7, 87, 88

Eilenbecker v. District Court, 134 U.S. 31 .... 32, 84, *passim*
Elkins v. United States, 364 U.S. 206 37

Feldman v. United States, 322 U.S. 487 ..... 23, 24, *passim*
Fisher v. Pace 336 U.S. 155 .... 70, 84
Fox v. United States, 77 F. 2d 210 (C. C. A. 4 1935) .. 51

Gimbel Brothers, Inc., 100 N.L.R.B. 870 (1952) 90
Gouled v. United States, 255 U. S. 298 40
Green v. United States, 356 U.S. 165 .... 32, 70, 84

Hernandez v. Texas, 347 U.S. 475 .... 31, 83
Hutcheson v. United States, 369 U.S. 599 .... 23, 30, *passim*

In re Cheeseman, 49 N.J.L. 115 (S. Ct. 1886) 68
In re Cooley, 95 N.J. Eq. 485 (Ch. 1924), aff'd, 103 N.J. Eq. 377 (E. & A. 1928) 69
In Re Debs, 158 U.S. 364 84
In re Frank, 135 N.J.L. 429 (S. Ct. 1947) 68
In re Gonzales, 88 N.J.L. 536 (S. Ct. 1910) 69
In re Hand, 89 N.J. Eq. 469 (Ch. 1918) 69
In re Henn, 113 N.J. Eq. 155 (Ch. 1933), 114 N.J. Eq. 452 (Ch. 1933) 69
In re Oliver, 333 U.S. 257 70
In re Schmidt, 88 N.J. Eq. 21 (Ch. 1917) 69
In re Singer, 105 N.J. Eq. 220, 147 Atl. 328 .... 68, 69
In re Singer, 109 N.J. Eq. 103 (E. & A. 1931) 29

PAGE

In re Tiene, 17 N.J. 170 (1954) 69
International Typographical Union, Etc., 123 N.L.R.B. 806 (1959) 90

Jack v. Kansas, 199 U.S. 372 .... 23, 36
Johnson v. Zerbst, 304 U.S. 458 104

Knapp v. Schweitzer, 357 U. S. 371 ....4, 20, 22, 24, *passim*

Local 791, Etc., 115 N.L.R.B. 1004 (1956) 91
Local Union No. 1, Etc., 119 N.L.R.B. 1466 (1958) 90

Malloy v. Hogan (No. 110 at this Term) ....22, 23, *passim*
Mapp v. Ohio, 367 U.S. 643 .... 40, 44
McLeod v. Drivers and Chauffeurs Local Union No. 816, 178 F. Supp. 288 (S.D.N.Y. 1959), aff'd 227 F. 2d 800 (C.A. 2, 1960) 91
McNabb v. United States, 318 U.S. 332 36
Mills v. Louisiana, 360 U.S. 230 ....23, 27, *passim*
Myers v. United States, 264 U.S. 95 84

N.L.R.B. v. Brotherhood of Painters, Etc., 242 F. 2d 477 (C.A. 10, 1957) 90
N.L.R.B. v. Imparato Stevedoring Corp., 250 F. 2d 297 (C.A. 3, 1957) 90
N.L.R.B. v. Local 169, Etc., 228 F. 2d 425 (C.A. 3, 1955) 91
N.L.R.B. v. International Brotherhood of Teamsters, Etc., Local 182, 228 F. 2d 83 (C.A. 2, 1955) 90
N.L.R.B. v. International Longshoremen's and Warehousemen's Union, 210 F. 2d 581 (C.A. 9, 1954) 90
N.L.R.B. v. Local 542, Etc., 255 F. 2d 703 (C.A. 3, 1958) 90
N.L.R.B. v. Local 743, Etc., 202 F. 2d 516 (C.A. 9, 1953) 91
N.L.R.B. v. Local 803, Etc., 218 F. 2d 299 (C.A. 3, 1955) 90
N.L.R.B. v. Philadelphia Iron Works, 211 F. 2d 937 (C.A. 3, 1954) 90

PAGE

N.L.R.B. v. Wagner Iron Works, Etc., 220 F. 2d 126 (C.A. 7, 1955), cert. den. 350 U.S. 981 91
Nusbaum v. Newark Morning Ledger Co., 33 N.J. 419 (1960) 31, 79, 81
Nye v. United States, 313 U.S. 33 84

Pembina Consolidated Silver Min. & Mill Co. v. Pennsylvania, 125 U.S. 181 .... 31, 83
People v. Indian Peter, 48 Cal. 250 (1874) 62
Plumber's Local 298 v. County of Door, 359 U.S. 354 93

Radio Officers' Union, Etc. v. N.L.R.B., 347 U.S. 17 .. 90
Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362 .. 31, 83
Rupp Equipment Co., 112 N.L.R.B. 1315 (1955) 91

San Diego Building Trades Council v. Garmon, 359 U.S. 236 .... 33, 90, 91
Scull v. Commonwealth of Virginia, 359 U.S. 344 ... 74
State ex rel. Kowaleski v. District Court of Milwaukee County, 254 Wis. 363, 36 N.W. 2d 419 (1949) 62
Street, Electric R'way & Motor Coach Employees, etc. v. W.E.R.B., 340 U.S. 383 93

Teamsters Local 25 v. N.Y.N.H. & H.R.R. Co., 350 U.S. 155 93
Tinsley v. Anderson, 171 U.S. 101 84
Twining v. New Jersey, 211 U.S. 78 .... 23, 24, *passim*

Ullmann v. United States, 350 U.S. 422 81-82
United States v. Balaban, 26 F. Supp. 491 (N. D. Ill 1939) 50-51
United States v. French, 9 F. Supp. 30 (W. D. Mich. 1934) 51
United States v. Mineworkers, 330 U.S. 258 .... 66, 67
Unitied States v. Miranti, 253 F. 2d 135 (C.A. 2, 1958) 102
United States v. Murdock, 284 U.S. 141 .... 23, 36
United States v. Sacher, 182 F. 2d 416 (C.A. 2, 1950), affirmed, 343 U.S. 1 70
United States v. Shipp, 203 U.S. 563 84
United States v. United Mine Workers, 330 U.S. 258 84

PAGE

Van Sweringen v. Van Sweringen, 22 N.J. 440 (1956) 85
Watkins v. United States, 354 U.S. 178 74
Zimmerman v. Zimmerman, 12 N.J. Super. 61 (App. Div. 1950) 85

Federal Statutes:

Act of August 13, 1953, c. 407, 67 Stat. 541 8
Fifth and Fourteenth Amendments .....22, 24, *passim*
15 U.S.C.A. § 1 54
15 U.S.C.A. § 17 54
18 U.S.C.A. § 2 53
18 U.S.C.A. § 3 54
18 U.S.C.A. § 4 54
18 U.S.C.A. § 241 .... 54, 55
18 U.S.C.A. § 371 53
18 U.S.C.A. § 641 55
18 U.S.C.A. § 659 53
18 U.S.C.A. §§ 661, 662 55
18 U.S.C.A. § 1951 54
28 U.S.C. § 1257(3) 2
29 U.S.C.A. § 141(b) 10
29 U.S.C.A. §142(2) 10
29 U.S.C.A. § 151 10
29 U.S.C.A. § 152(3)(5)(8)(9) 10
29 U.S.C.A. § 153(d) 10
29 U.S.C. § 157 .... 6, 10, *passim*
29 U.S.C. § 158; (b)(1)(A); (b)(2); (b)(4)(ii) (A, B, C, D); (b)(7); (e); (b)(4)(D); (b)(1) (A); (b)(2) .... 6, 10, *passim*
29 U.S.C.A. § 160(a) 10
29 U.S.C.A. § 163 10
29 U.S.C.A. § 164(c) 10

PAGE

NEW JERSEY LAWS, RULES AND STATUTES:

L. 1953, c. 202, pp. 1511 et seq., as amended 8
L. 1956, c. 194 9

R.R. 3:4-6 50
R.R. 3:8 50
R.R. 4:46-5(c) 9
R.R. 4:87 .... 50, 51

R.S. 17:9A-263 60
R.S. 17:12A-90 60
R.S. 48:2-36 60
R.S. 49:1-19 60

N.J.S.A. 2A:84A-17 et seq. 78
N.J.S.A. 2A:84A-18 .... 10, 31
N.J.S.A. 2A:84a-19 10
N.J.S.A. 2A:84A-32, Rule 40, para. (2) 10, 76
N.J.S.A. 32:23-1 et seq. 8, 13
N.J.S.A. 32:23-9 61
N.J.S.A. 32:23-10, pars. 8, 11 9
N.J.S.A. 32:23-29 et seq. 91
N.J.S.A. 32:23-41 .... 90, 91
N.J.S.A. 32:23-62 9
N.J.S.A. 32:23-70 9
N.J.S.A. 32:23-85 .... 9, 91, 92
N.J.S.A. 32:23-86 .... 9, 57, 61, 62, 92
N.J.S.A. 32:23-89 92
N.J.S.A. 32:23-90 92

NEW YORK LAWS:

N. Y. Laws 1953, cc. 882, 883, as amended 8
New York Laws 1957, c. 188 9

Miscellaneous

	PAGE
88 A.L.R. 2d 463	55
Annotation, 96 L. Ed. 762	70
Labor Law Reporter, Labor Relations Vol's., ¶4135, par's. .0702, .109, .1092, .1095, .0855, 128	91
Leach, "The Federal Government and Interstate Compacts"	49
McKinney's Unconsolidated Laws, §§ 6700aa et seq.	8
29 Fordham L. Rev. 421	49

IN THE

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No. 138

WILLIAM MURPHY and JOHN MOODY, SR.,

Petitioners,

—v.—

THE WATERFRONT COMMISSION OF NEW YORK HARBOR.

PETITIONERS' BRIEF

Opinions Below

The opinion of the Supreme Court of the State of New Jersey, printed at R. 213-240, is reported at 39 N.J. 436, 189 A. 2d 36. The oral decision or opinion of the Superior Court of New Jersey, Law Division, Hudson County, is unreported and is printed at R. 143-165. We have also heretofore printed, in Appendices to our Petition for Certiorari herein, the following opinions, rendered in a companion or connected case involving the same parties and an earlier stage of the same proceedings and subject matter: (1) the opinion of the Supreme Court of New Jersey reported at 35 N.J. 62, 171 A. 2d 295 (Appendix "C", Pet. Cert.); (2) the oral opinion of the Superior Court of New Jersey, Law Division, Hudson County, rendered June 17, 1960, unreported (Appendix "D", Pet. Cert.). The relevance of the two last mentioned opinions as regards the issues of the instant certiorari proceedings is indicated at appropriate places *infra.*

Jurisdiction

The judgment of the Supreme Court of the State of New Jersey was entered March 4, 1963 (R. 241). The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3), since the petitioners are claiming rights, privileges or immunities under the Constitution and under certain statutes (as recited *infra*) of the United States.

Questions Presented

The Waterfront Commission of New York Harbor, a bi-State agency established under an interstate compact, subpoenaed the petitioners Moody and Murphy (Longshoremen's Union officials) to testify concerning a dock work stoppage in Hoboken, New Jersey in May, 1960, whose alleged purpose was to get rid of a crime-fighting chief security officer on the docks. The petitioners have been held in contempt, twice, for refusing to testify under these subpoenas. The second of those contempt cases gives rise to the instant petition for certiorari. The prior contempt case involved issues of N.L.R.B. preemption and adequate apprisal of the purpose or relevancy of the interrogation. After purging themselves of the prior contempt by invoking the privilege against self-incrimination, the petitioners were conferred immunity under ostensible statutory authority of the State of New Jersey (paralleling New York legislation for this bi-State agency). The immunity was expressly stated by the Waterfront Commission as not being intended to cover federal incrimination. Petitioners, still refusing to answer, were convicted in the Superior Court of New Jersey of both criminal and civil contempt, in a unified proceeding upon both the civil and criminal charges. These convictions were rendered after a "trial" in which the only disputed factual issue tried was whether the petitioners have grounds for fearing federal incrimination. Even as to this latter issue the petitioners were denied *in toto*, all relief by way of discovery, notwithstanding their detailed motions for discovery aimed at exploring the question of federal-state collaboration to incriminate petitioners as well as the question of whether the Waterfront Commission was really investigating "crime" or was still trying to obtrude itself into a federally pre-empted "N.L.R.B." area. The Supreme Court of New Jersey affirmed the judgments of civil contempt in all respects and it reversed and remanded as to the judgments of criminal contempt on the sole ground of the intermingling of the civil and criminal contempt proceedings. The Supreme Court of New Jersey did not reach the issue of petitioners' grounds for fearing Federal incrimination, because it held that the State-conferred immunity did not need to extend to Federal incrimination. For this same reason, and because it held the N.L.R.B. pre-emption to have been settled by the prior contempt litigation herein, the Supreme Court of New Jersey affirmed the denial of all of petitioners' requests for discovery. The Supreme Court of New Jersey also held that that State's general evidence statute defining self-incrimination to include Federal incrimination did not apply to Waterfront Commission investigations. The questions presented are:

1. Were the purported grants of immunity valid in view of the express exclusion of any grant of immunity against federal incrimination, where the situation in its nature

so strongly bespoke the probability if not the virtual certainty of federal-state collaboration to fight alleged waterfront crime, and where petitioners' diligent and exhaustive requests for discovery and for trial testimony to elucidate such federal-state collaboration were denied? Do not these circumstances invalidate the purported grants of immunity simply on the basis of this Court's reservation, in *Knapp* v. *Schweitzer,* 357 U. S. 371, as to proper cases which might arise in the future where the matter of federal-state collaboration in crime-enforcement should be present?

2. In any event, does not this case present a proper and indeed a compelling occasion for modification or abrogation of the primary ruling in *Knapp* v. *Schweitzer, supra*—approving a state grant of immunity even though federal incrimination might result?

3. Were petitioners convicted of "civil contempt" in contravention of their 14th Amendment rights of due process and fair trial, in view of the following posture of the record:—The only factual matters "tried" were (1) the issue of petitioners' grounds for fearing Federal incrimination (which, however, the appellate court below treated as immaterial in view of its holding that the State-conferred immunity need not extend to Federal incrimination), and (2) the facts as to the actual happenings shown on the record of the interrogation before the Waterfront Commission (which were not disputed, i.e., that the petitioners were asked certain questions, refused to answer them, invoked the privilege against self-incrimination, were given immunity, still refused to answer, etc.). There was no trial,

however, of the petitioners' claims that, in effect, they had no contemptuous intent and that their resistance to the Waterfront Commission's interrogation was grounded in good faith upon valid legal considerations. Those legal considerations included the following: (a) That petitioners were facing an accusatory and potentially punitive interrogation, entitling them to disclosure of the "case" against them and opportunity to defend; (b) that the failure and refusal of the Commission to afford to the petitioners the requested opportunity to make a rational judgment of the necessity and advisability of invoking the privilege against self-incrimination, which opportunity would have entailed apprisal to the petitioners of the Commission's damaging information against them (if any) and confrontation and cross examination of accusatory witnesses, worked a denial of due process of law in forcing the petitioners to exercise in the dark the onerous choice involved; and (c) that this failure and refusal of the Commission, and the concomitant denial of all the petitioners' requests for discovery, deprived petitioners of their fair constitutional opportunity to make a rational judgment as to whether the Commission's interrogation represented a bona fide inquiry into waterfront "crime" or whether, on the contrary, the Commission was merely still trying to intrude itself (as petitioners had claimed from the outset) into a federally pre-empted "N.L.R.B." area involving a "labor dispute".

4. As questions which may be deemed fairly comprised within the "questions presented" in our petition for certiorari (cf. our above question #3), the following questions which are adapted from our "questions presented"

in the prior appeal to this Court by the present petitioners (dismissed in 368 U.S. 32, October Term 1962, No. 362—see Jurisdictional Statement, pp. 6-7) are tendered for renewed consideration in the instant certiorari proceedings, on the theory not only that they are so comprised but also that the Waterfront Commission by its claim herein of waiver and estoppel on petitionerers' part of the right to plead the privilege against self-incrimination imports into the case these said following questions:*

(a) On the assumption, then, that petitioners were deprived of their fair constitutional opportunity to make a rational judgment as to whether the Commission's interrogation was a bona fide inquiry into waterfront "crime" or whether the Commission was merely still trying to invade an N.L.R.B. pre-empted "labor dispute" area, does not this case present the questions or sub-questions hereinafter next set forth?

(1) Do the pre-emptive effects of 29 U.S.C.A §§157, 158 and of related provisions of the Labor-Management Relations Act operate upon the subject matter of this case so as to deprive the Waterfront Commission of New York Harbor of the jurisdiction and authority asserted by it in its subpoenas addressed to the petitioners, in its interrogation of the petitioners, and in its contempt proceedings against the petitioners in the Courts of New Jersey? If so, is the state Waterfront Commission legislation involved, as construed and applied to sustain the Commission's investigatory

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* These issues of waiver and estoppel, which were not included among the "questions" presented in our petition for certiorari herein but have been brought into this case by the Waterfront Commission as explained *infra*, are the subject of our "question presented" No. 8, *infra*.

jurisdiction, repugnant to Article VI of the Federal Constitution?

(2) Is this case governed by the rulings and holdings of *DeVeau* v. *Braisted,* 363 U.S. 144?

(3) Does the congressional consent to the interstate compact here involved negate or diminish the federal pre-emptive effects referred to above?

(4) Is the Commission's assertion of jurisdiction and authority over the appellants incompatible with the express reservation of "the right to strike" in the bi-state legislation to which Congress here consented (N.J.S.A. 32-23-68)?

(b) On the assumption that the above sub-questions 4(a)(1), 4(a)(2), 4(a)(3) and 4(a)(4) are also brought back into the case by reason of the effect of questions no. 8 and 9 below, does not thereby further need arise to consider these last mentioned sub-questions in the instant proceeding?

5. Where "civil contempt" is for all practical purposes punitive and indeed indissoluble from "criminal contempt" charges in a single intermingled proceeding, are not the due process considerations in our question #3, above, fortified?

6. On the instant record, and in view of our questions #3 and #5, above, should not the Court consider in this full hearing on certiorari whether a new constitutional requirement of jury trial in "civil contempt" should be enunciated as a part of Fourteenth Amendment due process?

7. Is it a violation of Fourteenth Amendment equal protection to deny discriminatorily to persons interrogated by

the Waterfront Commission the benefit of the general New Jersey evidence statute which defines self-incrimination to include federal incrimination?

8. Is there support in this record (including the record of the prior contempt case herein) for the contention that the petitioners waived the assertion of their privilege against self-incrimination or that they are estopped from such assertion of their privilege?

9. If the Court should find meritorious the Waterfront Commission's argument of waiver and estoppel—which would mean that the Court would have concluded that petitioners had no reasonable or bona fide fear of self-incrimination and that at least one reason for this would have been petitioners' alleged sole belief that the only issue in the case was N.L.R.B. pre-emption of a "labor dispute" area—would this not afford a further reason for consideration of the N.L.R.B. pre-emption questions which we have set forth *supra* in these "questions presented"?

Statutes and Rules of Court Involved

The relevant statutory provisions and Rules of Court are printed partly in the Argument and partly in the Appendix, *infra*. The case involves portions of the New Jersey legislation relating to the Waterfront Commission of New York Harbor, a bi-state body established under an interstate compact (N. J. Stats. L. 1953, c. 202, pp. 1511 *et seq.*, as amended—see codification in N.J.S.A. 32:23-1 *et. seq.*).*

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* The New York counterpart legislation is N. Y. Laws 1953, cc. 882, 883, as amended—see McKinney's Unconsolidated Laws, §§ 6700aa *et seq.* The consent of Congress to the compact was given by the Act of August 13, 1953, c. 407, 67 Stat. 541.

Specifically involved is the validity, as here construed and applied, of the New Jersey provisions conferring on the Commission powers to grant immunity to witnesses (N.J.S.A. 32:23-86(5)). See also the New Jersey provisions conferring on the Commission subpoena powers and other investigative powers (N.J.S.A. 32:23-10, pars. 8, 11; N.J.S.A. 32:23-85(4)), and providing for punishment of witnesses, when duly subpoenaed to attend, for failure to produce other evidence before the Commission (N.J.S.A. 32:23-62). The immunity provision above referred to was not part of the original inter-state compact approved by Congress, but was enacted in 1956 in New Jersey (L. 1956, c. 194) and in 1957 in New York (New York Laws 1957, c. 188), as an agreement between the two States ostensibly supplementary to the Waterfront Commission compact and ostensibly amendatory thereof. This immunity legislation was ostensibly enacted pursuant to the provisions of Article XVI, section 1, of the Compact empowering the Legislature of either State, when concurred in by the Legislature of the other, to enact amendments and supplements to the Compact. N.J.S.A. 32:23-70. Other provisions of the Waterfront Commission legislation of New Jersey, and the New Jersey Rules of Court under which the Waterfront Commission instituted the within contempt proceedings (R.R. 4:46-5(c)), are quoted in the Appendix, *infra.* The case also involves, subordinately, the so-called New Jersey Evidence Act of 1960, which, although it expressly states that "a matter will incriminate * * * if it constitutes an element of a crime against * * * the United States, or * * * is a circumstance which with other circumstances would be a basis for a reasonable inference of a commission of such a crime, or * * * is a clue to the discovery of a matter which is within [such categories of crime]", was construed in this case by the Court below not to be applicable to immunity proceedings conducted by the Waterfront Commission of New York Harbor. See N.J.S.A. 2A:84a-18, 19, 32 (printed in the Argument, Point III, *infra.*). The case also involves several federal statutes, cited and discussed in Point I, *infra,* which petitioners claim give rise to reasonable fear of federal incrimination in the Commission's interrogation of petitioners.

Also, as indicated in our "questions presented" nos. 4 and 9, *supra,* the validity of the above mentioned investigative and immunity provisions, as construed and applied in this case (including the prior contempt case) is or may be presented for consideration in the instant certiorari proceeding on the ground of repugnancy to Article VI of the Federal Constitution in that such construction and application confirmed the Commission, a state body whose powers derive from state legislation, in an assertion of jurisdiction and power which by federal law are pre-emptively vested in a federal agency, the National Labor Relations Board (29 U.S.C.A. §§141(b), 142(2), 151, 152(3)(5)(8)(9), 153(d), 157, 158(b)(1)(A), 158(b)(2), 158(b)(4)(ii) (A, B, C, D), 158(b)(7), 158(e), 160(a), 163, 164(c)):*

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* The cited provisions of 29 U.S.C.A., which are lengthy, were printed in full in the Appendix to our Jurisdictional Statement in No. 362, Oct. Term, 1961 (see 368 U.S. 32).

Statement*

The controversy between the Waterfront Commission and these petitioners originated in the 1960 happenings previously referred to, which led to prior contempt citations against petitioners; and, as noted, petitioners have been purged of those prior contempts. The prior contempt proceedings arose as a result of refusals by petitioners in May, 1960, to answer certain questions in a hearing or investigative proceeding before the Commission. The instant contempt case arises from a similar situation in October, 1961, with one important difference, namely, that the petitioners' latest refusals to answer occurred after petitioners had invoked their privilege against self-incrimination and the Commission had purportedly conferred immunity upon them. The prior (1960) contempt proceedings—which involved primarily the issue of N.L.R.B pre-emption—led to an appeal by the present petitioners to this Court, which was dismissed (368 U.S. 32—Oct. Term 1961, No. 362). We shall have occasion to refer, hereinafter, to our Jurisdictional Statement in said appeal to this Court, and we respectfully request the Court to refer to the copies of that Jurisdictional Statement which we assume still repose in the Court's files.**

The prior contempt proceedings (1960) had also involved an issue of apprisal to the instant petitioners as to the purpose of the Waterfront Commissoin's interrogation. Petitioners had insisted, unavailingly, throughout those prior contempt proceedings (see our prior Jurisdictional Statement mentioned *supra*), that the record did not show an adequate due process apprisal to them of the Commission's contention that it was interested in investigating Waterfront "crime" as distinct from investigating a "labor dispute" within the pre-emptive jurisdiction of the N.L.R.B. We readily acknowledge that when the petitioners appeared before the Commission again for renewed interrogation, after the conclusion of the prior contempt proceedings (in which, again, petitioners were purged of said prior contempt), petitioners stood apprised of the general purpose of the Commission's interrogation. That is, although petitioners had not had such apprisal during the 1960 interrogation itself, they did learn from the subsequent 1960 court proceedings in the contempt case stemming therefrom that the Commission conceived the 1960 work stoppage as possibly being an impairment of the portwatchman system (in the person of a man named Markley), which is to say that the Commission conceived itself to be engaged in an investigation of possible waterfront crime or of efforts to combat the Commission's program of fighting such waterfront crime.

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* All papers in the proceedings below which are distinctly necessary for consideration of the case of each of the two petitioners, are printed in the Record herein. In the case of other papers, which present no essential points of difference as between the two petitioners, such as the Commission's motions for contempt (R. 3), the Record prints only the papers relating to petitioner Moody.

** As noted *infra*, the N.L.R.B. pre-emption issues were expressly again raised by petitioners in the proceedings below.

Nevertheless, the apprisal issue became acute in a new form when the Commission renewed its interrogational efforts (October 3, 1961) because it was now more explicit on the record that the Commission aimed at implicating the petitioners in some kind of criminal activity, i.e., the petitioners in this renewed interrogation were now more indicatedly facing an out-and-out accusatory procedure, in which, furthermore, it was realized by everyone that the Commission's statutory power to confer immunity was probably going to be invoked to strip the petitioners of the protection of the privilege against self-incrimination. The very reason of the Commission's existence, namely the fighting of waterfront crime, formed the motive of this renewed interrogation, according to the Commission's own insistent assertions (e.g., R. 3-6). The at least ostensibly accusatory nature of the interrogation, therefore, could no longer be doubted. The Commission's statutory powers, moreover, include a fearsome array of punitive weapons (N.J.S.A. 32:23-1 *et seq.*) Thus, the petitioners were facing not merely an *accusatory* proceeding, but also a potentially *punitive* one at the hands of the Commission itself. The petitioners were not merely being "investigated", then, but were also being "tried", in view of the peculiar combination of powers that are vested in this Commission. These circumstances alone, without more, would have caused the petitioners to insist upon adequate apprisal of any damaging information that the Commission possessed concerning them, and the right to be confronted with the accusatory witnesses and to cross-examine those witnesses.

However, there was still a further reason why the petitioners felt so entitled. In view of the over-hanging threat of the Commission's immunity powers, and in view also of the fact that it is always a serious disadvantage to a person to be put in the position where he may have to exercise his privilege against self-incrimination, the petitioners considered that they were entitled to full apprisal of the Commission's "case" against them before they should have to make the painful choice of invoking the privilege.

For all of the above reasons, the petitioners, at the proceedings before the Commission on October 3, 1961, and in the subsequent proceedings before the Commission (see below), asserted in a systematic manner at every appropriate stage their requests for apprisal along the lines above mentioned.

The pertinent parts of the transcripts of the Commission's proceedings of October 3, 1961 were before the courts below as Exhibits in support of the Commission's motions for contempt (Exh. E—Murphy; Exh. F—Moody; R. 14-43).

These transcripts are in all essential respects a virtual re-play of the Commission's style of interrogation of the petitioners in the May, 1960 proceedings. That is, in those 1960 proceedings and once again in these October 3, 1961 proceedings the Commission flatly declined to disclose any damaging information which it might possess concerning petitioners, and it merely informed them that it was interested in finding out the purpose of the alleged opposition to port watchman Markley. Every effort by the petitioners to ascertain the purpose and pertinency of the interrogation to any degree beyond the utterly general "apprisal" just described, was rejected, including requests by the petitioners for production of any order by the Commission directing the investigation to be held, and including also requests that the Commissioners themselves (or any other persons having knowledge of the matter) appear as witnesses in the Commission's proceedings (R. 15-30, 32-43).

Furthermore, and, we think, important, the petitioners unavailingly urged at the October 3, 1961 proceedings our above-described position that the Commission was prejudicing the petitioners' rights of due process in putting them to the onerous choice of invoking the privilege against self-incrimination before giving them sufficient apprisal of the accusatory facts to enable them to make such choice on a rational basis.*

The Commission's representatives at the October 3, 1961 proceedings overruled all of the petitioners' objections except the privilege against self-incrimination. Except for answering questions about their identity and the title of their offices in the Union, both petitioners refused to answer all questions, invoking the privilege against self-incrimination (which they did under the protest above noted based on denial of due process of law) (R. 15-43). The Commission's representatives thereupon announced that the proceedings would be adjourned pending a determination by the Commission as to whether to invoke the immunity provisions of the Compact (R. 30, 43). In the interim petitioners were purged of the prior contempt because they had invoked the privilege against self-incrimination (R. 46).

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* The following is one of the several statements of the petitioners' position before the Commission on October 3, 1961 (R. 34):

> "Mr. Krieger: * * * I object * * * in that * * * there is a failure to state the purpose of this investigation, the pertinency of this question and further, * * * now I ask you for the purpose and pertinency of the statement, detail the specific charges that may concern this individual, also the names of any witnesses to support such charges and a confrontation with such witnesses. I make these requests on the grounds of due process of law and the right of a fair hearing and examination. I am pointing out that the Commission is an accusatory agency expressly claiming that its function is to deal with commissions of crime by individuals. This makes the Commission a combination of a Grand Jury and a punitive tribunal. And if the purpose and pertinency and all the other full apprisals above described have not been made, then Moody is forced under these circumstances to make a choice on whether or not to invoke privileges guaranteed by the Constitution, and * * * in a setting that denies him due process of law. That being so, there are serious disadvantages that he is placed in both legal and social, which attach to a person who is compelled to invoke the privilege of self incrimination. It constitutes a denial of due process of law to force this man to choose to invoke, at such a disadvantage the privilege of self incrimination. The Waterfront Commission, by refusing to give us full apprisal from which we would be able to determine rationally whether we need to invoke self incrimination, is forcing us to invoke the privilege in the dark, and is forcing us to incur the disadvantages above-mentioned in the dark, * * * without due process of law. And, therefore, under the circumstances this witness must invoke the privilege of self incrimination under protest. * * *"

On October 27, 1961, the petitioners were again required to appear before the Commission's representatives, for the purpose of having conferred upon them the dubious boon of "immunity". The transcripts of the Commission's proceedings of October 27, 1961 were before the Courts below in the instant contempt proceedings as Exhibits annexed to the Commission's motions for contempt (Exh. I—Murphy; Exh. J—Moody; R. 47, 72).

In the October 27, 1961 proceedings, once again, the purpose of the proceedings was stated by the Commission's representatives in the now familiar terms of mere generality ("to inquire into violations of the Compact in connection wtih a work stoppage in May 1960", etc.). The petitioners reiterated their prior demands for a fuller statement of the purpose and pertinency of the interrogation, including requests for any relevant order of the Commission that might show a determination by the Commission as to purpose or pertinency. The petitioners also pointed out that there had never yet been in this case any explicit judicial determination as to the issues of adequate apprisal. All such objections or requests by the petitioners were rejected. The only statement vouchsafed by the Commission's representatives in support of their announced intention to invoke their alleged immunity powers was a bare recital of the procedural history of this case. (R. 47-83).

Before the petitioners took the stand at the Commission's proceedings on October 27, 1961, the objections of due process which they developed in the proceedings of October 3, 1961—see, *e.g.*, our last preceding footnote, *supra* —were restated for the record (R. 49, 74). These objections were likewise re-stated at appropriate times during the course of the questioning of the petitioners on October 27, 1961 (R. 48 *et seq.*).

Most especially, the petitioners on October 27, 1961 objected to the purported grant of immunity on the ground that the immunity did not extend to federal incrimination; the Commission's representatives stated that the grant of immunity did not so extend to federal incrimination (R. 57-59, 93).

The questioning of the witnesses (the petitioners) on October 27, 1961 followed the pattern of the witnesses' invoking the privilege against self-incrimination under all the objections, reservations and protests earlier described in connection with the proceedings of October 3, 1961; the Commission's representatives either directing each witness to answer the questions notwithstanding his claim of privilege, or directing him so to answer on the express ground that he was being granted immunity (R. 54-71, 72-82).

The petitioners also invoked, in the proceedings of October 27, 1961, all of the grounds asserted in their Jurisdictional Statement filed with this Court in their attempt to obtain review of the prior contempt judgments (R. 79-

80). This brought back into the case, we submit, the issue of N.L.R.B. preemption (as fully argued in our aforesaid prior Jurisdictional Statement).

At the conclusion of the proceedings of October 27, 1961, the Commission's representatives directed their attorney to proceed against the petitioners for contempt (R. 72, 82).

The Commission's motions to punish petitioners for contempt (R. 3 *et seq.*) (after the above-described supposed grants of "immunity"), recited once again the Commission's official purposes as an organization created "to eliminate evil conditions and criminal and corrupt practices in the port of New York District" (R. 3; and see R. 3-7), recounted in detail the history of the prior contempt proceedings (R. 6-9), set forth the statutory provisions relating to the Commission's power to grant immunity (R. 9-10), recited the interrogational proceedings of October 3, and 27, 1961 (R. 8-9), and requested that petitioners be punished as for both a civil and a criminal contempt of court (R. 13)—the 1960 contempt having been solely *civil* (R. 7). Annexed to the motions were the various exhibits, to which reference has been made, depicting the prior history of this matter (R. 14-89).

The petitioners filed an answer to the Commission's motions denying all the allegations, and raising separate defenses, *inter alia*, of failure to grant immunity against federal incrimination, denial of due process of law, preemption of the subject matter of the inquiry by the Federal Management Labor Relations Act, and inadequate apprisal of purpose and pertinency (R. 90-92). Petitioners also moved for a bill of particulars (R. 93-96), and for an order requiring answers to interrogatories.* Petitioners also requested a jury trial (R. 97).

In describing the next step in this matter—the "trial" of the instant contempt proceedings following the conferral of "immunity"—we come to a striking feature of the case. Notwithstanding that the motions for contempt expressly sought conviction both for criminal and civil contempt, and notwithstanding that the proceedings were not in the remotest way based upon conduct of the petitioners that could conceivably bring into play any "summary" power to punish for contempt, the trial court announced at the "trial" of the contempt motions that no witnesses would be heard and no testimony would be taken—which meant that the petitioners would be "tried" on what amounted to criminal charges based solely on the Commission's moving papers, the petitioners not even having the benefit of affidavits on their own behalf because they had entered a general denial *per* their formal answer to the contempt motions in the unquestioning assumption that they were going to have a "trial" at which testimony would be introduced. See, *e.g.*, R. 106-107, 117.

Testimony by the petitioners on the issue of their cause to fear federal incrimination (R. 119-140) was the only evidence taken at the "trial" below, notwithstanding repeated requests by the defense (*e.g.*, R. 116, 117).

All of the petitioners' defenses of law and fact raised by their answer to the contempt motions were rejected by the trial court. Petitioners' motions for discovery were denied. Their request for jury trial was denied (R. 143-165, 176-183).

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* The interrogatories sought information identical with that sought by the bill of particulars and are not printed in the Record. These requests for discovery, as more fully recited *infra*, were especially directed to the matter of federal-state collaboration to fight waterfront crime and any such alleged criminal activity by the petitioners.

The trial court ruled that the Commission's grant of immunity was valid. Both petitioners were adjudged guilty of both civil and criminal contempt and were sentenced to fine and imprisonment (R. 176-183).*

In the appeal from the contempt convictions in the court below—the Supreme Court of New Jersey, which had directly certified the appeal from the Appellate Division of the Superior Court—the judgments of conviction of criminal contempt were reversed and remanded on the ground of the intermingling of the civil and criminal proceedings, but the judgments of civil contempt were affirmed (R. 213 *et seq.*).** The retrial of the criminal contempts (in which jury trial has been denied) is stayed pending the present proceedings in this Court (on Petitioner's supplemental brief in support of Petition for certiorari). The Court below ruled, in effect, that by virtue of decisions of this Court, notably *Knapp* v. *Schweitzer, supra*, there is no constitutional requirement that State-conferred immunity shall protect against Federal incrimination; and it held that the New Jersey Evidence Act of 1960 (*supra*), which defines the New Jersey privilege against self-incrimination as embracing matters of federal incrimination, is not applicable to the bi-state legislation relating to the Waterfront Commission. The Court below also held that the petitioners' contentions addressed to the issue of

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* This sentence intermingled the civil and criminal phases.

** The seeming effort of the Court below to disentangle the "civil" and "criminal" sentences was, we submit, ineffectual (R. 240, 241).

N.L.R.B preemption were not properly presented for decision because, the Court said, those matters had been litigated and disposed of in the prior contempt proceedings. The Court below also held that petitioners' contention that they should not have been required to make the onerous choice as to invoking their privilege against self-incrimination in the dark, as it were, was without substance. As we understand the decision of the Court below, it was seemingly on the basis of the rulings just described that the Court also ruled that all of petitioners' requests for discovery, including those addressed to the issue of Federal-State collaboration to incriminate petitioners and to the issue of the bona fides of the Waterfront Commission's assertions that its investigation was aimed at waterfront crime rather than a "labor dispute", had been properly denied by the trial court. Also, since the Court below took the view that a State conferral of immunity is not constitutionally required to extend to Federal incrimination, that Court declared that it deemed it unnecessary to determine whether the petitioners herein had grounds to fear federal incrimination. The Court below deemed the Waterfront Commission's needs to pursue criminals (including apparently even "federal" criminals) so paramount that it said (R. 230-231):

> "If, as defendants contend, a witness may claim the privilege against self-incrimination with respect to federal crimes notwithstanding a conferral of bi-state immunity by the Commission, it would follow that there could be no effective investigation not only of the state aspects of such crimes but even of the non-criminal aspects of waterfront conditions *since possible federal criminal overtones are frequently present.* This is so because of the nature of waterfront activity *and its constant involvement with in-*

> *terstate commerce and other such areas of federal jurisdiction.* Since the Commission cannot grant immunity as to the federal crimes it will remain helpless. The difficulty is not merely fanciful; it might well result that investigations by the Commission would be seriously hampered and, in many cases, frustrated." (Emphasis supplied)

It remains to mention that the Supreme Court of New Jersey also rejected the Commission's contention that petitioners had waived or were estopped from asserting their privilege against self-incrimination (R. 222). In motion proceedings had in this Court after the granting of certiorari herein, the Commission requested (and obtained) additional designation of items to be printed in the record which relate to the issues of waiver and estoppel, and we are therefore obliged to argue those issues in this brief. The facts and record references relating to this topic are set forth at the appropriate place in our Argument, *infra.*

Summary of Argument

1. The purported grants of immunity by the respondent Waterfront Commission in this case were invalid under the Fifth and Fourteenth Amendments (self incrimination and due process of law) in view of the express exclusion of any grant of immunity against Federal incrimination. This case presents a proper occasion for abrogation of the rule of *Knapp* v. *Schweitzer*, 357 U.S. 371, approving a state grant of immunity which did not protect the witness against federal prosecution. The granting of certiorari and the scheduling of argument concurrently in our case and in *Malloy* v. *Hogan* (No. 110 at this Term) focus attention upon the earlier decisional history in this Court which culminated in the *Knapp* ruling just mentioned—

with which latter case the Court may now indicatedly be prepared to reconsider also *Mills* v. *Louisiana,* 360 U.S. 230 and *Hutcheson* v. *United States,* 369 U.S. 599.

The earlier decisions just alluded to include *Twining* v. *New Jersey,* 211 U.S. 78, which first laid down the rule that the States are not bound by the Federal Constitution in regard to any privilege against self-incrimination. They include also *Brown* v. *Walker,* 161 U.S. 591, 606 (federal immunity legislation upheld despite failure to bar use of the coerced testimony in state prosecutions); *Jack* v. *Kansas,* 199 U.S. 372, 380 (rejecting the reverse claim as to a state immunity statute, but expressing a seeming incredulity that federal prosecutive officials would ever abuse the situation thereby opened up); *United States* v. *Murdock,* 284 U.S. 141, 149 (in effect "codifying" the *Brown* and *Jack* rules); and, of course, *Feldman* v. *United States,* 322 U.S. 487 (permitting use in a federal criminal trial of evidence coerced by a state grant of immunity).

Significant in the decisional history from *Twining* to *Hutcheson* is the uniqueness of the "Feldman" type of fact situation—actual use in a federal criminal prosecution of state-immunity-coerced testimony. This is important for two reasons: (1) The *Feldman* decision has been spoken of several times by the dissenting or concurring Justices as being one of the keys which needs to be refashioned in order to arrive at a fair and rational rule on the issues of federal-state incrimination and immunity; (2) neither our case nor the *Malloy* case (No. 110 at this Term) presents the Feldman fact situation, yet certiorari has been granted in both of these cases. The Court's decision to entertain on the merits the *Malloy* case conjointly with ours suggests that the Court is prepared to attack *de novo* the entire state-federal immunity problem without pausing necessarily to review distinctly first the *Feldman* doctrine in a case directly presenting the *Feldman* type of facts. In short, it would seem that the Court may be disposed at this time to undertake a fundamental re-examination of the doctrine of the *Twining* case itself, and that a ruling may be forthcoming that the Fifth Amendment privilege against self-incrimination applies to the States through the Fourteenth Amendment. Such a ruling would, of course, import into the field of state inquisitional immunity the constitutional obligation to render any conferral of state immunity equal in scope to the constitutional protection and privilege (the Federal Fifth Amendment) which is sought to be overborne.

Broadly speaking, two lines of policy reasoning have customarily been adduced by the Majority Justices in the *Twining-Feldman-Knapp* types of situation to justify what the dissenting or concurring justices have decried as the "whipsawing" effect of the existing rules whereby the Federal and State sovereignties respectively may coerce testimony by conferring immunity but without protecting the victim against prosecution by the other sovereignty. The first of those lines of policy reasoning is concerned with the interest of preserving the system of "federalism" or "dual sovereignty"; the second is concerned with the interests of effective law enforcement.

We argue in detail in Point I of this brief, *infra,* that neither of these policy lines of reasoning is persuasive in the present setting:

The "dual sovereignty" approach is fallaciously conceptualistic in the setting of the federal-state problem of self-incrimination and immunity. No aggrandizement of federal power at the expense of state power would occur if the federal constitutional privilege against self-incrimination were applied to the state, or if federal and state conferrals of immunity each were required to protect against prosecution by the other respective sovereignties. The real (not the conceptual) result would be to *reduce* federal governmental powers, through the curtailment of the prosecutive weaponry of federal law enforcement authorities. And the comparable curtailment which would affect state law enforcement would still not mean "centralism" at the expense of "dual sovereignty". The diminishment of the powers of both the federal and state governments would mark an enlargement of individual rights under the Constitution, not an enlargement of governmental power *anywhere.* The real question, then, is that of the diminishment of the total combined corpus of federal-and-state law enforcement powers. To this question there is only one legally acceptable and historically right approach. The question can be approached solely in terms of the United States Constitution. Zeal for law enforcement can claim no historical or constitutional value when it is sought to be set against the supreme values of humane and civilized polity which are expressed in the Fourth, Fifth and Fourteenth Amendments.

In short, when one scrutinizes, non-conceptualistically, this issue of Federal-State immunity in terms of both of the two conventional arguments of policy above noted—the argument from Federalism or dual sovereignty and the argument from the claimed needs of effective law enforcement—one finds (a) that there is no authentic "federalism" problem at all in the sense of any danger of an aggrandizing governmental centralism; and (b) that the only real problem is whether the combined governmental powers of both the Federal and the State sovereignties shall prevail aggrandizingly over the constitutionally protected rights of the individual citizen.

Although we are urging these considerations as calling for that larger perspective in this case which would result in overruling the *Twining* doctrine itself and in making the Fifth Amendment self-incrimination privilege applicable to the States, the particular circumstances of our case enable us to argue also for a reversal of the judgments here under review on more limited grounds. Our case brings into play the reservation enunciated in *Knapp* for situations of collaboration between state and federal officers. Our case comes within that reservation for three reasons: (1) the intrinsic federal-state character of the Waterfront Commission's crime-fighting function; (2) our express but unavailing efforts in the proceedings below to obtain exhaustive discovery with the declared view of developing this matter of federal-state collaboration for criminal law enforcement in this intrinsically federal-state field; and (3) the numerous federal criminal statutes under which petitioners herein had reasonable fear of incrimination in regard to the subject matter of their interrogation by the Waterfront Commission.

We are advised that the respondent Waterfront Commission, and the *amici curiae* who will speak in this case on behalf of organizations of state prosecutive officials, will urge that there is no need for this Court to outlaw state conferrals of immunity which exclude protection against Federal prosecution since it is enough for the Court merely to outlaw actual federal use of state-coerced incriminating testimony, by overruling the *Feldman* case. The answer to this suggested way out of the "whipsaw" effects of the present doctrine has been given in the dissenting opinion of the Chief Justice in *Mills* v. *Louisiana,* 360 U.S. 230, 235-236 (quoted in our Point I, *infra*). Furthermore, if this Court adopts the broader solution to the problem it would not follow that the state immunity-conferring agencies would be obliged to grant federal immunity to anyone. There is a perfectly simple and easy alternative—the state agencies may merely refrain from insisting upon the conferral of any immunity at all, state or federal, that is, they may simply recognize the privilege against self-incrimination as being effective against both state and federal incrimination. In other words, if this Court should now rule that it is constitutionally unfair to confer state immunity without an accompanying conferral of federal immunity, the only consequence would be an obligatory retrenchment of state power to coerce testimony in criminal matters. There would not be opened up at all the constitutionally perplexing problem of state conferral of federal immunity, with or without an act of Congress authorizing such state conferral.

Viewed in this way, the situation is seen as involving, once again, that admittedly crucial issue which we have earlier argued, namely, the issue of whether the Bill of Rights stands higher than the desires of those who favor facile law enforcement as the paramount value.

Our argument in point I, *infra,* concludes with the theme that the state immunity system does not necessarily operate invariably in a responsible and conscientious manner on the part of the state jobholders who administer this awesome governmental power over the individual citizen, and that both the immunity statute itself which is involved in this case and the administration of the immunity-conferral process in this case are marked by disturbing aspects of slackness and lack of concern for individual rights and conscientious exercise of power.

2. Petitioners' conviction of what was rather incongruously termed "civil contempt", was in contravention of their Fourteenth Amendment rights of due process and fair trial.

The only factual matters "tried" in this peculiarly commingled proceeding involving charges of both "criminal" and "civil" contempt were petitioners' grounds for fearing federal incrimination and the happenings of the interrogation before the Waterfront Commission (which were not disputed).

There was no trial, however, of the petitioners' claims that, in effect, they had no contemptuous intent and that their resistance to the Waterfront Commission's interrogation was ground in good faith upon valid legal considerations.

Those legal considerations are summarized in our "question presented" #3, *supra* to wit, that petitioners were entitled to disclosure and opportunity to defend against an accusatory and potentially punitive "case"; that petitioners were denied the requested opportunity to make a rational decision as to invoking the privilege against self-incrimination; and that they were likewise denied a fair constitutional opportunity to make a rational judgment as to whether the Commission's interrogation represented a bona fide inquiry into waterfront "crime" or whether the Commission were merely still trying to intrude itself into a federally pre-empted "N.L.R.B. area."

In our argument in Point II, *infra*, we take up, before discussing these several incidences of unfair trial the question of the reality or unreality of the supposed distinction between "civil" and "criminal" upon the present record. Technically, we are before this Court in this case solely seeking review of judgments of "civil" contempt, since the Supreme Court of New Jersey reversed on the charge of criminal contempt while affirming on the commingled charge of civil contempt. Our argument in Point II, *infra,* shows that these judgments of "civil" contempt are for constitutionally practicable purposes indistinguishable from "criminal" contempt.

Returning to the incidences of unfair trial in this case:—The ambit of defenses in a "civil" contempt trial of the present type is, or ought to be, no different from that in prosecutions for crime. Cf. *Cooke* v. *United States,* 267 U.S. 517, 536-539. Specifically, the defense of lack of intent, together with related defenses as to motive, good faith, justification, and the like, and, in general, full right to make "defense or explanation," are accorded to defendants in criminal contempt trials (*ibid*) and should be accorded here. Furthermore, the defense of lack of intent assumes additional importance because New Jersey is one of the state jurisdictions which still recognize an at least qualified right of expurgation by disavowal of contumacious intent. (*In re Singer,* 109 N.J. Eq. 103 (E. & A. 1931)). Further, also, the defense of lack of intent bears on mitigation of punishment. *Cooke* v. *United States, supra,* 267 U.S. at p. 538. The total closing off of the petitioners' opportunity to introduce their proofs as to intent, motivation, good faith and the like, or to make "defense or explanation" was a denial of Fourteenth Amendment due process.

With the foregoing principles and authorities in mind, we proceed in our Point II, *infra,* to consider more specifically the ways in which the petitioners were unconstitutionally circumscribed in their right to make defense in the contempt "trial" below. The trial issues, as noted, included important issues of fact, notably intent. The denial of our requests for discovery left it impossible to know in any meaningful way just what the Commission considered to be the supposedly legitimate purpose of the interrogation. These uncertainties bring forward urgently the question of fair trial on the issue of the petitioners' alleged intent to commit contempt. A witness who sincerely claims that he sincerely lacks a contemptuous intent in declining to answer official questions because the official questioner will not enlighten him as to the subject matter with sufficient explicitness to enable the witness to make a rational judgment as to whether he is legally obliged to answer the questions, is entitled to a full trial of fact on these issues of his intent and of his state of mind when he is tried on a charge of contempt.

The denial of discovery was important also for the following reason, which we are advancing as an admittedly novel constitutional contention: The refusal to afford to the petitioners the requested opportunity to make a rational judgment of the necessity and advisability of invoking the self incrimination privilege, which opportunity would have entitled apprisal to the petitioners of the Commission's damaging information against them (if any) and confrontation and cross-examination of accusatory witnesses, worked a denial of due process of law in forcing the petitioners to exercise the onerous choice involved. *Cf. Hutcheson* v. *United States*, 369 U.S. 599, 638 *et seq.* (dissenting op.).

3. Petitioners have been denied the equal protection of the laws under the Fourteenth Amendment in that the rul-

ings below deny to persons interrogated by the Waterfront Commission the benefit of the general New Jersey Evidence Statute which defines self-incrimination to include federal incrimination. N.J.S.A. 2A:84A-18; *Nusbaum* v. *Newark Morning Ledger Co.*, 33 N.J. 419. The Court below declined to follow the above cited general Evidence Statute on the ground that the Waterfront Commission's own immunity legislation had not been "repealed" by that statute. The result stands, therefore, that the law of New Jersey discriminates between persons interrogated by the Waterfront Commission on one hand, and all other persons who may be called upon to decide whether to invoke the privilege against self-incrimination. The present petitioners, then, are members of a "class" which is the only class of persons in New Jersey who are subject to having conferred upon them compulsory immunity without protection against federal incrimination.

The equal protection clause was designed to prevent not only persons but classes from being singled out as a special subject of discriminatory legislation. E.g., *Pembina Consolidated Silver Min. & Mill Co.* v. *Pennsylvania*, 125 U.S. 181; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U.S. 362; *Hernandez* v. *Texas*, 347 U.S. 475.

4. Where, as here, "civil contempt" is for all practical purposes criminally punitive and substantially indistinguishable from "criminal contempt", whether in a single intermingled proceeding or not, a new constitutional requirement of jury trial in "civil contempt" should be enunciated by this Court as a part of due process of law. The forthcoming decision of this Court in the pending case of Governor Barnett will, of course, have an important bearing on this question. We are here explicitely trying

to assimilate into the doctrinal area of "criminal contempt", that so-called "civil contempt" situation which we believe to be present in this case as urged in our Point II, *infra*. With this in mind, we present in our Point IV, *infra*, a discussion of the authorities on the constitutional aspect of jury trial in "criminal" contempt—there apparently being no significant authority as to this jury trial question in regard to the peculiar kind of "civil contempt" here involved. *Green* v. *United States*, 356 U.S. 165 dealt with federal not state power. This difference is not nominalistic. Nor has the Court considered the state-level question (i.e., as to jury trial in criminal contempt) *de novo* since it first held nearly seventy-five years ago, in *Eilenbecker* v. *District Court*, 134 U.S. 31, that the Federal Constitution does not require a jury trial in state prosecutions for criminal contempt. We show in Point IV, *infra*, that, in the few instances in which the Court has subsequently cited the *Eilenbecker* case, it has done so without new comment; and only two of those were state contempt cases, where, respectively, a jury had not been demanded, and an attorney was behaving defiantly in *facie curiae* and was convicted *instanter*.

5. If the Court should entertain petitioners' contention that they were entitled to fuller apprisal as to the factual basis of the Commission's interrogation on the question of "crime" versus "labor dispute", or if the Court should entertain the Commission's contention of waiver and estoppel of petitioners' privilege on the theory that petitioners believed no "crime" but only a "labor dispute" was involved, then the Court should also entertain and decide the question of whether the area of the Commission's inter-

rogation in this case is preempted by the Federal Management Relations Act; and the Court should rule that such preemption does apply.

This preemption question was considered in detail by the Court below in the prior stage of this case (35 N.J. 62), the Court holding that the preemption did not apply; this Court dismissed the appeal from the latter decision (368 U.S. 32); and in the instant proceedings in the Court below the preemption issue (which we again raised) was deemed to have been settled in the prior case. It has not, however, been settled by this Court on the merits.

The Court below came to its decision on the preemption issue by a simplistic reading of *DeVeau* v. *Braisted*, 363 U.S. 144. Whereas the "crime prevention" theme of *DeVeau* touched (and only in the narrowest way) solely the matter of selection of union officers, the decisions below in our case apply that "crime prevention" theme in a way which touches all the myriad forms of happenings that may arise in non-amicable labor-management relations, every form of active-or-passive conduct by aggrieved or dissatisfied labor unions or employees,—in short, the entire range of labor-management troubles envisaged by the term "labor dispute." In effect the doctrine of the decision below crowds out all questions of "arguable" federal preemption (*San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236) because it allows room only for a preemptive state power.

6. We show in Point VI, *infra*, by a detailed examination of the record and of the briefs in the Courts below, that the petitioners have never waived or estopped themselves from asserting their privilege against self-incrimination, and that the Commission's suggestions to the contrary are, to put it bluntly, preposterous.

ARGUMENT

POINT I

A. The purported grants of immunity by the respondent Waterfront Commission in this case were invalid under the Fifth and Fourteenth Amendments (self incrimination and due process of law) in view of the express exclusion of any grant of immunity against Federal incrimination, inasmuch as the situation in its nature so strongly bespoke the probability if not the virtual certainty of Federal-State collaboration to fight alleged waterfront crime, and inasmuch as petitioners' diligent and exhaustive requests for discovery and for trial testimony to elucidate such Federal-State collaboration were denied. These circumstances invalidate the purported grants of immunity simply on the basis of the reservation, in *Knapp* v. *Schweitzer,* 357 U.S. 371, as to proper cases which might arise where Federal-State collaboration in crime-enforcement should be present.

B. In any event, this case presents a proper occasion for abrogation of the primary ruling in *Knapp* v. *Schweitzer,* approving a State grant of immunity which did not protect the witness against Federal prosecution.

C. Petitioners respectfully join in the contention by the petitioners in No. 110 at this Term (*Malloy* v. *Hogan*) that the Fifth Amendment privilege against self-incrimination should be held applicable to the States through the Fourteenth Amendment.

The fact that the Court has scheduled the argument of the instant case to follow immediately that in No. 110 (*Malloy* v. *Hogan*) — not to say the fact that the Court has granted certiorari in both of these cases—prompts us to present the following by way of introductory under the above Point heading:

The frequent and animated attention which the Court has itself devoted during its last few Terms to the problem of federal-state incrimination and immunity (*Knapp* v. *Schweitzer*, 357 U.S. 371; *Mills* v. *Louisiana*, 360 U.S. 230; *Hutcheson* v. *United States*, 369 U.S. 599) enables us to be brief in setting forth herein what we conceive to be the doctrinal setting in which our case and the *Malloy* case come before the Court for decision at this time.

Before we undertake to formulate what we understand to be the makeup of the cluster of constitutional issues in the *Knapp-Mills-Hutcheson* picture, the doctrines enunciated in the earlier decisions to which the debate among the Justices in *Knapp-MillsHutcheson* refers will be noted.

Twining v. *New Jersey*, 211 U.S. 78, was described in 1947 by Mr. Justice Black (dissenting) as "the first, as it is the only, decision of this Court, which has squarely held that states were free, notwithstanding the Fifth and Fourteenth Amendments, to extort evidence from one accused of crime" (*Adamson* v. *California*, 332 U.S. 46, 69-70); the *Adamson* decision, just cited, ratified the *Twining* doctrine. *Feldman* v. *United States*, 322 U.S. 487, decided three Terms before *Adamson*, permitted use in a federal criminal trial of evidence coerced by a state grant of immunity. This precise holding of *Feldman* was without the benefit of prior precedent in the decisions of this Court, although earlier the Court had already countenanced a number of other incidences restrictive of the self-incrimination privilege in situations involving problems of Federal-State incrimination and immunity. *Brown* v. *Walker*, 161 U.S. 591, 606 (federal immunity legislation upheld despite failure to bar use of the coerced testimony in state prosecutions); *Jack* v. *Kansas*, 199 U.S. 372, 380 (rejecting the reverse claim as to a state immunity statute, but expressing a seeming incredulity that federal prosecutive officials would ever abuse the situation thereby opened up); *United States* v. *Murdock*, 284 U.S. 141, 149 (in effect "codifying" the *Brown* and *Jack* rules—"The principle established is that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination".)

See also *Byars* v. *United States*, 273 U.S. 28 and *McNabb* v. *United States*, 318 U.S. 332, cited by the majority in *Feldman, supra* (322 U.S. at p. 494) as affording "ample safeguards * * * [i]f a federal agency were to use a state court as an instrument for compelling disclosures for federal purposes * * *."

Knapp v. *Schweitzer*, 357 U.S. 371, approving (seemingly again, as in *Jack* v. *Kansas* and in *United States* v. *Murdock, supra*) the exercise of the state immunity power despite failure to protect against federal incrimination, does not seem to have advanced significantly in doctrinal terms the rule of the *Jack* and *Murdock* cases, unless it be said that the Court's deeming not significant presence in *Knapp* of a specific federal criminal statute whose purview coincided with that of the state inquisition involved was thus doctrinally significant.

We, of course, do not need to remind the Court of the sharp division of opinion among the Justices in *Knapp* or of the consensus among the three dissenting Justices that the Feldman decision, *supra,* was due for reexamination; or of Mr. Justice Brennan's view (concurring in *Knapp* with the Majority), likewise, that *Feldman* should be reexamined in a case factually requiring consideration of the *Feldman* rule (that state immunity-coerced testimony is admissible in a federal prosecution). Nor, recurring to *Feldman* itself, do we need to remind the Court that the latter decision had relied strongly (along with its reliance on the "federalism" or dual sovereignty[*] considerations) on the analogy of the then-still-intact "silver platter" doctrine, which has since met its demise in *Elkins* v. *United States,* 364 U.S. 206.

In *Mills* v. *Louisiana,* 360 U.S. 230, the Court split on the question of whether the facts should have been held to bring into play the reservation which the Court had made in *Knapp* for situations where "a federal officer should be a party to the compulsion of testimony by a state agency" (357 U.S. at p. 380), as well as on the more comprehensive doctrinal questions of federal-state incrimination and immunity.

The *Mills* case, *supra,* it should also be noted for reasons which we shall bring out in a moment, did not on its facts present the *Feldman* issue (actual Federal use, in a Federal criminal prosecution, of state immunity-coerced testimony).

In *Hutcheson* v. *United States,* 369 U.S. 599, the split among the Justices on the doctrinal aspects to which we have been referring was even more vivid, at least from a statistical standpoint, for the majority opinion was subscribed to by only three Justices; that opinion reaffirmed the

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[*] This "federalism" theme is further noted *infra.*

Twining, Adamson, Feldman, and *Knapp* doctrines. (The *Hutcheson* facts did not present, again, the *Feldman* factual issue—actual use in a federal criminal prosecution of state-immunity coerced testimony.)

In our foregoing resumé of the decisional history from *Twining* to *Hutcheson,* we have called attention to the non-recurrence of the "Feldman" type of fact situation. This is important for two reasons: (1) The *Feldman* decision has been spoken of several times by the dissenting or concurring Justices as being one of the keys which needs to be re-fashioned in order to arrive at a fair and rational rule on the issues of federal-state incrimination and immunity; (2) neither our case nor the *Malloy* case (No. 110 at this Term) presents the *Feldman* fact situation, yet certiorari has been granted in both of these cases. This latter circumstance encourages us to argue further as follows:

The granting of certiorari in *Malloy* suggests that the Court may be prepared to attack *de novo* the entire state-federal immunity problem without pausing necessarily to traverse first the area of the *Feldman* case. In other words, it would seem from the granting of certiorari in *Malloy* (and conjointly in our case), that the Court may be disposed at this time to undertake a fundamental re-examination of the doctrine of the *Twining* case itself—and of the *Adamson* case as well, it would seem.

We do not have to point out that a ruling by this Court (in *Malloy,* or, whether derivatively from *Malloy* or otherwise, in our case) that the Fifth Amendment self-incrimination privilege applies to the states through the Fourteenth Amendment, would import into the field of state inquisitional immunity the constitutional obligation to render any such conferral of state immunity equal in scope to the constitutional protection and privilege (the Federal Fifth Amendment) which is sought to be overborne. Such a ruling by this Court would make the privilege against self-incrimination truly National in its effectiveness, and would once and for all eliminate the qualifications and the exceptions of decisional nicety which have had the "whipsawing" consequences upon individuals trapped in the federal-state incrimination-and-immunity dilemma as noted in recent dissenting opinions in this Court.

It is against this background of decisional expectation which we trust the Court's granting of review in our case and in the *Malloy* case may justify, that we present the following considerations of a general character in support of the overruling of the *Twining, Feldman* and *Knapp* cases:—

Interestingly, it was in the majority opinion in *Feldman* that the herein-presented issues of historical policy in our federalistic framework—the issues of federal-state incrimination and immunity—were stated as pointedly as could be wished (322 U.S. at p. 489):

> "The effective enforcement of a well designed penal code is of course indispensable for social security. But the Bill of Rights was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should not be sacrificed. We are immediately concerned with the Fourth and Fifth Amendments, intertwined as they are, and expressing as they do supplementing phases

of the same constitutional purpose—to maintain inviolate large areas of personal privacy. * * *." *

In what we are here urging we are far, let us hasten to say, from counselling any approach to the great question of American Federalism which would undervalue or disparage in the slightest the authentic historical utility of our federalistic system as being doubtless history's most remarkable instance of "containment" of the potentially excessive powers of governmental centralism in a large Nation. Concern over the dangers of such centralistic pretensions permeates the majority reasoning in cases like *Feldman* and *Knapp.* It is our suggestion, which we should now like in all respectful earnestness to develop in a little detail, that the Federal-State immunity problem does not in truth present an authentic issue of "centralism" v. "federalism", and that the previous discussions of this problem on the part of the proponents of the "Federalism" approach** has not been free of conceptualistic elements in its basic assumptions.

We intend no offense to anyone when we thus characterize the "Federalism" approach to this great question as being conceptualistic—and indeed fallacious. Let us examine the matter: First of all, where, in the Federal-State incrimination problem, is there any actual trace or suggestion that a plenary mutualization of the respective spheres of Federal and State privilege against self-incrimination would effect any aggrandizement of Federal *power?* A quite opposite result would arise from such a mutualization. For the real (not the conceptual) result would be to *reduce* Federal governmental powers, through the curtailment of the prosecutive weaponry of Federal law enforcement authorities. If it is also true—and we concede that it obviously is—that a comparable curtailment would be felt by state law enforcement authorities as well, this still plainly does not mean "centralism" at the expense of "Federalism" or dual sovereignty. What it does mean, and all that it means, is that the powers of *both* the Federal Government and the State Governments would be diminished, and that the potency of the Bill of Rights in conjunction with the Fourteenth Amendment would be enlarged both nationally and locally.

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* The coalescent character of the Fourth and Fifth Amendments was noted also in *Boyd* v. *United States,* 116 U.S. 616; *Gouled* v. *United States,* 255 U.S. 298; *Mapp* v. *Ohio,* 367 U.S. 643.

** We respectfully note that Mr. Justice Black may well have conceded too much to those proponents in his remarks at 322 U.S. 497-498 (*Feldman* v. *United States,* dissenting op.).

It is this last which presents, then, the real (rather than the conceptual) question in the debate over Federal-State immunity. Let us therefore examine, in a similarly concrete and non-conceptualistic way, this latter question of diminishment of the total corpus of Federal-and-State law-enforcement powers which would undeniably result from a plenary mutualization, as we above put it, of Federal-State privilege against self-incrimination.

It seems to us that to this latter question there can be only one legally acceptable and historically right approach. The question can be and has to be approached solely in terms of the United States Constitution—at least that is the only way it can be approached in this Court, however else it might be approached in the only Tribunal of higher resort known to our system, namely, that ultimate national forum which comes into operation when the process of amending the Constitution is invoked. Before this Court, the anguished cries of law-enforcement zealots and careerists, even the more earnestly pondered representations of the more sober-minded among our Federal and State prosecutive officialdom, can be given literally no weight if such has to be done only at the expense of the supreme values of humane and civilized polity which are expressed in the Fourth, Fifth and Fourteenth Amendments. We respectfully suggest that the present case affords to this Court an opportunity to spur further the return of a sense of tradition to the law of Governmental inquisition. The departure from law and steadfast democratic tradition which is inherent in oppressive inquisitorial law enforcement is so fundamentally shocking that it is perhaps in the very enormity of this shock that we must search for explanation of the astonishing indifference and insensitivity which so much prevailed among us in recent times concerning these matters. It is barely a decade ago that a visitor coming upon our scene would have imagined himself viewing a people gathered in a Coliseum to applaud the savagery of the Sovereign himself, as a people once applauded a Commodus. The investigative or police arm of a democratic government exists to serve the people and not to stand as master over them. It is wrong, in a democracy, to prefer the interest of governmental investigative or police policy over the interests of the individual citizen. There is no value whatever in governmental police policy for its own sake. In our society all value is accorded to the individual, and each individual dwells equally under this shield of democratic value.

In short, when one scrutinizes, *non-conceptualistically,* this issue of Federal-State immunity in terms of both of the two conventional arguments of policy above noted—the argument from Federalism or dual sovereignty and the argument from the claimed needs of effective law enforcement—one finds (a) that there is no authentic "federalism" problem at all in the sense of any danger of an aggrandizing governmental centralism; and (b) that the only real problem is whether the combined governmental powers of both the Federal and the State sovereignties shall prevail aggrandizingly over the constitutionally protected rights of the individual citizen.

This real question is the one that the Court is called upon to resolve in the present case. As earlier said, we take it from the fact of the granting of certiorari both in our case and in No. 110 (*Malloy* v. *Hogan*) that the Court is disposed to come to new grips with this question, and that the doctrinal orientation of the majority Justices in the Court's previous decisions relating to this subject matter is open for reconsideration. That is why we have presumed, in our foregoing remarks, to address the Court on these issues in terms of that large historical perspective which is fitting and necessary in the setting of a Constitution of the American type.

Having said all of this—i.e., having prayed this Court to re-formulate the federal-state immunity doctrine in National terms as an integrated Fifth-Fourteenth Amendment doctrine—we go on to point out also, and nevertheless, that the old "Barron v. Baltimore" (or "Bill-of-Rights v. Fourteenth Amendment) issue which would appear to be integral to the issue-framework in No. 110 (*Malloy* v. *Hogan*), is not necessarily of comparably dispositive importance in our case. A rational, fair and constitutionally acceptable administration of the immunity device in situations of the sort presented by our case—where the supposed "lines" of "division" between the respective "state" and "federal" purviews are so blurred—does not necessarily depend upon an across-the-board ruling by this Court that the Fifth Amendment privilege against self-incrimination applies to the States through the Fourteenth Amendment.

In other words, what we are now suggesting is that a judgment of reversal in our case, on its particular facts, may be properly rendered by this Court even if the larger constitutional enterprise of overruling the *Twining-Adamson* doctrine is not to be essayed by the Court at this time.

Our argument with a view to these more limited decisional possibilities in the instant case begins with a phase of our case—as distinct from *Malloy's*—which relates to the practical administration of the state-conferred immunity system (*Malloy* on its facts does not reach the question of immunity as such). We anticipate that in respondent's brief and in the amicus curiae briefs which will be filed in this matter by the District Attorneys' and State Attorney Generals' associations it will be urged that there is no need for this Court to outlaw state conferrals of immunity which exclude protections against Federal prosecution since it is enough for the Court merely to outlaw actual federal use of state-coerced incriminating testimony. In other words, respondent and the amici curiae apparently feel that everything can be put constitutionally right in this vexed problem area of Federal-State incrimination and immunity by merely overruling the *Feldman* case. This, it is apparently felt, would bring the Federal-State incrimination and immunity area into constitutional conformity with the Federal-State search-and-seizure area as re-enunciated by this Court in *Mapp* v. *Ohio*, 367 U.S. 643. The answer to this expected argument has been given, however, we think, in the dissenting opinion of the

Chief Justice in *Mills* v. *Louisiana,* 360 U.S. 230 at pp. 235-236, where it is pointed out that the solution is not quite so easy, the Chief Justice saying:

> "I come then to the question left open in the Knapp Case: whether, where, as here, a State is used as an instrument of federal investigation, witnesses can successfully assert their federal privilege against self-incrimination in state proceedings. Knapp v. Schweitzer (U.S.) supra, suggests that where testimony is compelled in such circumstances, the testimony would be inadmissible in a subsequent federal prosecution. See Byars v. United States, 273 U.S. 28, 71 L. ed. 520, 47 S. Ct. 248: See also Feldman v. United States, 322 U.S. 487, 494, 88 L. ed. 1408, 1415, 64 S. Ct. 1082, 154 A.L.R. 982. But this is only partial protection. To compel testimony in a federal investigation, a witness must be assured at the outset complete immunity from any prosecution which might result from his compelled disclosures. Counselman v. Hitchcock, 142 U.S. 547, 35 L. ed. 1110, 12 S. Ct. 195; Brown v. Walker, 161 U.S. 591, 40 L. ed. 819, 16 S. Ct. 644; Blau v. United States, 340 U.S. 159, 95 L. ed. 170, 71 S. Ct. 223; Ullmann v. United States, 350 U.S. 422, 430, 100 L. ed. 511, 520, 76 S. Ct. 497, 53 A.L.R. 2d 1008. There is no indication that such protection obtains here—that petitioners are protected from federal prosecutions which might result from their testimony even though that testimony is not admissible in the subsequent proceeding. Byars v. United States, 273 U.S. 28, 71 L. ed. 520, 47 S. Ct. 248, supra, merely prohibits the introduction of illegally seized evidence and Knapp v. Schweitzer, 357 U.S. 371, 2 L. ed. 2d 1393, 78 S. Ct. 1302, supra, and Feldman v. United States, 322 U.S. 487, 88 L. ed. 1408, 64 S. Ct. 1082, 154 A.L.R. 982, supra, speak merely of the non-use

> of the compelled testimony in a subsequent federal prosecution. None of these cases deals with the fruits of the compelled testimony, and defendants, like petitioners, who are forced to testify under circumstances similar to those here present, are left without the protection against self-incrimination intended by the Constitution. These cases, in my opinion, should be extended to prohibit any prosecution resulting from disclosures compelled under circumstances similar to those which exist here. But this is not an established principle and a witness is entitled to more than hopes of immunity when federal agencies seek to compel incriminatory testimony. * * * "

That a solution of the problem in terms of merely overruling the *Feldman* case would be unsatisfactory both from a practical and a constitutional standpoint is further indicated by the following: It is elementary that only the legislative Branch of the government may grant, or authorize the granting of, immunity from criminal prosecution (*Feldman* v. *United States*, 322 U.S. at p. 493). And, to be sure, one thoretically perfect and quite neat solution for the problem would be an Act of Congress authorizing state immunity-conferring authorities, or state legislatures, to confer immunity from federal prosecution—assuming that the rather bewildering constitutional difficulties of such an inter-sovereign delegation of powers could be overcome. Fortunately, our constitutional system, through the institution of judicial review pursuant to the Supremacy Clause, opens a ready path of escape from this appallingly cumbersome legislative alternative. What is here called for, again, is to see just exactly what is involved in terms of concrete application, not mere concepts. What is it that actually happens, in concrete procedural terms, when an individual and a state immunity-conferring agency confront each other in a potential setting of federal incrimination? The individual asks the state agency whether its proffered immunity covers federal incrimination, the state agency answers "no", the individual declines the proffered immunity and reasserts his privilege, and the state agency nevertheless "confers" the state immunity—the aftermath being a state prosecution for contempt (the present case). Nowhere in this scene is it ineluctably written that if the *Twining*, *Feldman* and *Knapp* cases did not exist, the state agency would be obliged to go forward and grant the resistant individual federal immunity. For there is a perfectly simple and easy alternative—namely, that the state agency merely recognize the privilege and refrain from insisting upon the conferral of any immunity at all, state or federal. In other words, if this Court should now rule that it is constitutionally unfair to confer state immunity without an accompanying conferral of federal immunity, the only consequence would be an obligatory retrenchment of state power to coerce testimony in criminal matters. There would not be opened up at all the constitutionally perplexing problem of state conferral of federal immunity, with or without an act of Congress. Viewed in this way, the situation is seen as involving, once again, that admittedly crucial issue which we have earlier argued, namely, the issue of whether the Bill of Rights stands higher than the desires of those who favor facile law enforcement as the paramount value. In this sense, too, this branch of our argument does bring us back into common cause with the petitioner in *Malloy*—a posture which, we hasten to say, we find in no wise uncomfortable and as to which we surely intend no invidious comparison and no ungracious attitude in any sense. Still, we owe it to our own petitioners to repeat that our case does involve the immunity problem in an immediate decisional way, while the *Malloy* case does not. And hence we do urge that the considerations of constitutional practicality with which we have been dealing in this and in our preceding paragraph with regard to the problem of administering the state-immunity system as such, are deserving of the Court's attention in specific relation to our case as distinct, if necessary in the Court's wisdom, from the *Malloy* case.

Our theme that reversal of the judgment below in our case does not depend upon a plenary mutualization (as we earlier phrased it) of federal and state "immunity", draws its chief support, however, from the reservation enunciated in the majority opinion in the *Knapp* case, *supra*, for situations of "collaboration between state and federal officers", wherein "the defendant could successfully assert his privilege in the state proceedings" (357 U.S. at p. 380). We respectfully urge that the record in our case comes within that reservation, for two reasons: (1) The intrinsic federal-state character of the Waterfront Commission's crime-fighting function; and (2) the record posture of our express but unavailing efforts in the proceedings below to obtain exhaustive discovery with the declared view of developing this matter of federal-state collaboration for criminal law enforcement in this intrinsically federal-state field. In addition—and constituting what could justifiably be termed a third reason in the same intrinsic sense just suggested—there is the matter of the really quite impressive number of federal criminal statutes which bear upon the so-called "state" area of incrimination here involved (see details *infra*).

Let us examine more closely the above mentioned reasons in support of our contention that federal-state collaboration is present here in legal contemplation and in practical fact.

On the point as to the Waterfront Commission's intrinsic status as what we may term a "semi-federal" agency, our argument may proceed along lines which are rather obvious, but which for that very reason are the more compelling. The Waterfront Commission of New York Harbor is, as shown earlier in this brief, a bi-state agency created by federally approved Compact which is designed (so the Commission itself never tires of asserting) to combat waterfront crime in interstate and foreign commerce. The Commission must necessarily deal with interstate and foreign commerce.* It is common for interstate agencies to have direct relations with federal departments. 29 *Fordham L. Rev.* 421, 431, Leach, "*The Federal Government and Interstate Compacts.*" Indeed, the compact in question provides for direct relations in areas where federal funds are sought by the Commission. N.J.S.A. 32-23-77.

We respectfully call attention also to the language of the majority opinion in *Cleary* v. *Bolger*, 371 U.S. 392 where the Court refers to the present Waterfront Commission as an agency "which works in close cooperation with the Customs Service in matters of law enforcement on the waterfront".**

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* All this is indeed emphasized in the opinion herein by the Court below.

** The denial of injunctive relief against the "State officer" (a Waterfront Commission detective) in a "search-and-seizure" setting in the *Cleary* case does not, of course, touch the constitutional problem areas of our case.

On the point concerning our diligent and exhaustive, but fruitless, efforts to obtain discovery that would have helped to elucidate this all-important question of the Commission's collaboration with federal criminal law enforcement agencies both in the general sense and as specifically applied to the allegations against the present petitioners—a point which we respectfully deem to be of quite possibly dispositive importance in this case within the meaning of the above mentioned reservation in *Knapp* v. *Schweitzer*—we bring once again to the Court's attention the record details of these futile efforts of ours to secure such discovery. As earlier pointed out, we moved for a bill of particulars to this end, we served interrogatories*, and we reserved the right to proceed to take depositions and to serve demand for admissions (see our last preceding footnote, and especially R. 100 and "Defendant's Memorandum In Support Of Right To Discovery", etc., filed below in the Superior Court).* An idea of the exhaustiveness and of the meticu-

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* Both of these steps—the motion for bill of particulars and the interrogatories—were indisputably in accordance with applicable statutes and court rules of the State of New Jersey. Our motions, as said, were for a bill of particulars and an order to answer interrogatories. The New Jersey Rules of Practice for civil and criminal contempts respectively are to be found separately set forth in parts 3 and 4 of the Revised Rules. See R.R. 3:8 ("Criminal Contempt") and R.R. 4:87 ("Contempt"—referring to both civil and criminal contempts). The Rules of Criminal Practice in Part 3 of the Revised Rules expressly provide for bills of particulars. R.R. 3:4-6. On the face of the latter Rule, and in view of the fact that said Rule is contained in the same "Part" of the rules as is R.R. 3:8 ("Criminal Contempt"), a defendant in a proceeding for criminal contempt is entitled to move for a bill of particulars under R.R. 3:4-6. The latter Rule refers not only to the "indictment" but also to the "accusation". The "accusation" in our case, consisted of the Commission's motion papers. We took the position, in seeking discovery as aforesaid, that within the meaning of R.R. 3:4-6 this "accusation" "is not sufficiently specific to enable the defendant to prepare his defense". Our reasons for contending that the "accusation" was thus inadequate are developed in this brief, *passim*. Under the closely comparable federal practice, it is settled that a defendant in a criminal contempt proceeding is entitled to move for a bill of particulars. The leading case is *United States*

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v. *Balaban,* 26 F. Supp. 491, 498 (N. D. Ill. 1939), where the Court said:

> "* * * the analogy between a proceeding in criminal contempt and an indictment for a criminal offense is so compelling as to leave no doubt that, in a proper case, a bill of particulars may be exacted * * *"

Accord: *United States* v. *French,* 9 F. Supp. 30-31 (W. D. Mich. 1934); *Fox* v. *United States,* 77 F. 2d 210-211 (C. C. A. 4 1935); *Conley* v. *United States,* 59 F. 2d 929, 935 (C. C. A. 8 1932).

As regards the civil aspect of the Commission's motions for contempt herein, petitioners were entitled *a fortiori* to pretrial discovery by all appropriate avenues made available under Part 4 of the Revised Rules of Civil Practice in the Superior Court of New Jersey. The contempt proceedings herein insofar as they arose on the civil side had to be conducted pursuant to R.R. 4:87; indeed, it would appear that the alleged contempts herein insofar as they arose on the criminal side also brought into play R.R. 4:87, inasmuch as the latter rule deals with both civil and criminal contempts. No reason is apparent to us, and we do not see how any could be suggested, that would justify denying to a defendant in a civil (or a civil and criminal contempt proceeding) under R.R. 4:87 the rights of pretrial discovery which are provided generally for all proceedings under Part 4 of the Revised Rules.

Specifically in this case, the pretrial discovery which we sought on the civil side was by way of interrogatories, although we reserved also the right to proceed to take depositions and to serve demand for admissions. See R. 100, and "Defendant's Memorandum in Support of Right to Discovery", etc., filed in the Superior Court (Printed in the Appendix hereto, *infra*).

The particulars sought by our motion for bill of particulars (R. 93) were identical with our interrogatories—which is why we did not print the latter in our "Appendix" below, or in the instant Record, as previously mentioned. A single set of proper answers to either the bill of particulars or to the interrogatories would have sufficed to cover both of those discovery requests.

* Through inadvertence the Momorandum just mentioned was not designated by us for inclusion in the Record herein. As mentioned in the preceding footnote, we print as an Appendix to this brief the text of the latter memorandum.

lousness with which we formulated these requests for discovery may be readily had by a glance at R. 93-96, where our "notice of motion for bill of particulars" is printed. We also extensively briefed the discovery question in the appeal in the Supreme Court of New Jersey ("Joint Brief For Defendants-Appellants William Murphy and John Moody, Sr. In Consolidated Appeals", Point V, pp. 40-44).*

We are emphasizing this subject of our unsuccessful efforts to obtain discovery in the proceedings below because it seems to us that if ever the reservation enunciated in *Knapp* is to become a reality in a specific case, a demonstration by the person invoking this reservation that (as we are demonstrating here) he sought and was refused discovery (both pretrial and at the trial) to elucidate an at least highly probable federal-state collaboration to incriminate him, should weigh heavily in causing this Court to apply that *Knapp* case reservation.

That such federal-state collaboration was in fact at least highly probable in our case is indicated, as we earlier suggested, not only by the intrinsic element of the Waterfront Commission's being an interstate-and-foreign-commerce crime-fighting agency, but also by the existence of specifically applicable federal criminal statutes, a point which we also mentioned earlier and which we shall now elaborate.

Although the Court below deemed it unnecessary to reach the question, we point out that, upon the Commission's own assertions in its various papers throughout this litigation, petitioners Murphy and Moody do indeed face exceedingly dire prospects of federal incrimination. Throughout this litigation, the Commission has been trumpeting the suspicion that Murphy and Moody have some guilty knowledge of or involvement in an unlawful concert by union longshoremen aimed at removing from the waterfront scene a reputedly diligent and honest port watchman or port security officer (Markley), the obvious imputation being that Murphy and Moody are in some way guiltily involved in an attempt to make it possible for thieves to steal property on the waterfront.

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* The brief just mentioned was captioned "In The Superior Court of New Jersey, Appellate Division", but it ultimately was received as the brief in the Supreme Court of New Jersey when the latter Court directly certified the appeal from the court of first instance.

From this, it at once becomes evident that, if the Commission's imputations are to be credited, coerced testimony by Murphy and Moody on the subject matter in question would put them in direct peril of incrimination arising under 18 U.S.C.A. § 659, and statutes adjective thereto. Said § 659 makes it a federal crime to embezzle, steal, etc. from any "railroad car, wagon, motor truck, or other vehicle, or from any station, station house, platform or depot, or from any steamboat, vehicle or *wharf* * * * any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express". Said § 659 contains additional detailed provisions, too lengthy to be quoted, which would place Murphy and Moody in peril of prosecution on the basis of the Commission's imputations. Our reference above to provisions which we termed "adjective" to § 659 has in view the federal criminal provisions against conspiracy to commit any federal offense (18 U.S.C.A. § 371), against aiding and abetting in the commission of any such offense (18 U.S.C.A. § 2), against acting as an accessory after the fact in regard to any such offense (18 U.S.C.A. § 3), and against misprision of federal felonies (18 U.S.C.A. § 4). Thus, under the theory of the Commission's own imputations in this case, Murphy and Moody would have reasonable cause to fear federal prosecution for conspiracy to assist in making it possible for thefts to be perpetrated at the Hoboken pier here involved, for conspiracy to effect misprision of the thieves, for aiding and abetting in such theft or in such conspiracy, and for acting as accessories after the fact in such thefts or conspiracy—not to say Internal Revenue offenses.

Similar reasonable cause to apprehend federal incrimination arises under the following additional federal statutes: (1) 18 U.S.C.A. § 1951 (the so-called anti-racketeering statute punishing the offense of interference with commerce by threats or violence—"whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do", etc.); (2) "conspiracy" or "combination" "in restraint of trade or commerce" under 15 U.S.C.A. § 1, *i.e.*, violation of the federal anti-trust law (it is to be noted that 15 U.S.C.A. § 17, exempting labor unions from certain aspects of the anti-trust laws, would not be a bar to federal prosecution in the circumstances connoted by the Waterfront Commission's imputations herein); (3) criminal prosecution for violation of the federal civil rights law, 18 U.S.C.A. § 241, in that the alleged attempt by Murphy and Moody to force Markley off the docks would come within the statutory language "if two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the

* * * *laws* of the United States", Markley's rights under the Federal Management Labor Relations Act being protectible under said civil rights statute, as shown below; (4) furthermore, on the quite possible theory that the alleged thefts at the waterfront might involve situations arising under the "special maritime and territorial jurisdiction" of the United States, Murphy and Moody face the danger of federal incrimination (under the Commission's imputations) pursuant to 18 U.S.C.A. sections 661 and 662, pertaining to thefts within said special federal jurisdiction (the above mentioned conspiracy, aiding and abetting, misprision, etc. provisions being pertinent hereto also); (5) also, should the alleged waterfront thefts involve any "things of value of the United States, or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof", similar federal incrimination could arise under 18 U.S.C.A. section 641 and the "adjective" statutes above mentioned.

Further as concerns the possibility of a federal civil rights prosecution above mentioned, we respectfully refer the Court to Point V, *infra,* where we spell out in detail the ways in which Markley's rights under the Labor-Management Relations Act could be operative in this case. Any asserted violation of those federally protected rights of Markley by Murphy and Moody could be federally incriminatory as a denial to Markley of rights given to him by "federal law" within the meaning of 18 U.S.C.A. section 241, the civil rights penal provision above discussed.

See also 88 A.L.R. 2d 463.

Finally, we call attention to the following item in connection with the Commission's interrogation of Murphy and Moody in the "immunity"-conferral proceedings in this case, which serve to underscore the reality and the rationality of the petitioners' fear of Federal incrimination if they should answer the Commission's questions: Not content with asking the petitioners about the port-security (i.e., imputedly "criminal") aspects of the *May 1960* longshoremen's walkout, the Commission *on October 27, 1961* demanded that the petitioners answer questions about their *then* knowledge and intentions concerning this port-security feature which was allegedly entailed in the alleged opposition to the presence of port-watchman Markley; by this questioning, we submit, the Commission manifested to the petitioners that it was imputing to them a *continuing* complicity in alleged violations of federal criminal statutes (R. 69-71).

In concluding our treatment herein of the issues of federal-state incrimination and immunity,* we offer these additional observations:

(1) The state immunity system does not necessarily operate invariably in a responsible and conscientious manner on the part of the state jobholders who administer this fearsome governmental power over the individual citizen. State by state, agency by agency, the constitutional quality of the administrative performance in this area is bound to vary. Once in a long historical while a governmental agency and its career personnel may evolve and mature

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* The issues of alleged waiver and estoppel as to petitioners' right to claim the privilege against self-incrimination are treated separately in Point VI, *infra.*

to a stage of administrative statesmanship where the courts can feel that the "presumption of administrative regularity" is not merely a juridical slogan. It is not likely that anyone would claim such prestigious achievement-status for any presently existing state immunity-conferring administrative agency. Later in this brief (Point VI, *infra*) we shall have occasion to present the facts which point to something less than a high objectivity of official purpose and official conduct on the part of the state immunity-conferring agency which is involved in this particular case. From the days when the age-old debate first began among political philosophers over the question of whether mortals who happen to occupy the seat of sovereignty can ever be trusted with certain of the more far-reaching degrees of governmental power over the lives and liberties of individuals, it has been fitting and proper to ask whether each particular pretension towards new official power ought to be repelled (or at least greeted with the most cautious doubts) simply on the basis that power is *ipso facto* suspect and carries no presumptive value merely for its own sake in the eyes of enlightened men.

We think it is worthwhile noticing in a little detail just how slackly the immunity-conferral process in our case was administered by the Waterfront Commission—and indeed how slackly the instant immunity statute itself treats this subject matter:

Since the central issues in this case are of constitutional dimension, it is pertinent to point out that the Waterfront Commission here did not comply with the requirements of its own immunity statute (N.J.S.A. 32:23-86). Thus, the purported letters of "notice" which the Commission sent to the various law officers of the two States (R. 83-90) were nothing but bare recitals of the procedural course of the prior contempt proceeding, and of the fact that the Commission's interest in questioning the petitioners arises generally in connection with the 1960 work stoppage. These letters of "notice" could not in the remotest fashion effectively inform the respective law officers of the facts essential to enable those officers to arrive at any rational judgment as to whether the case was an appropriate one for concurrence by such law officers in the Commission's proposed granting of immunity. The statutory requirement for the giving of such advance notice to the law officers of the two states is obviously an essential pre-condition to the exercise of the immunity power of the Commission; the statute declares that "Immunity shall not be conferred upon any person except in accordance with the provisions of this sub-division". What else could be the purpose of such a statutory notice requirement if it is not that the law officers to whom such notice must be given are to have an effective opportunity to make the appropriate discretionary judgment as to the desirability from the public standpoint, and the justice from the individual witness' standpoint, of invoking this drastic power? There was no such opportunity in this case. It is apparent that the "notice" requirement was treated as a merely empty formality. Authorities which we cite below in other connections, will reveal in an even more serious light, the legal impropriety of this perfunctory handling of the "notice" requirement in the instant case.

The Commission failed to comply with the immunity statute in still another way. We refer here to the fact that the Commission's representatives at the proceedings of October 27, 1961, when the purported immunity was conferred, did not even see fit to make the grant of immunity explicit as to each question on which the petitioners' claims of privilege were being overruled (R. 47-82, *passim*). This amounts to more, indeed, than a failure to comply with the statute. It is a sheer failure to apply the statute at all. Under this inept and inexplicit record of supposed conferrals of "immunity," the defendants would be in a parlous plight at the hands of zealous prosecutors in the future seeking to overcome these abortive "immunity" conferrals.

If the statute be construed to permit the exercise of this drastic power of immunity in the perfunctory and slack manner connoted by our two preceding paragraphs, it would fall under the State's own constitutional ban against improper delegation of power—a result which must become all the more sure* in light of still further defects that we are now to mention. It is familiar that virtually all immunity statutes, both state and federal, do not operate upon any delegation of power whatsoever by the legislature, but operate as it were self-executingly; that is, such statutes ordinarily provide simply that in specified interrogational proceedings testimony shall be compulsory and that immunity shall attach; in other words, the legislature flatly, itself, grants the immunity in advance to all future members of the class of persons involved, there being no provision made for discretionary choice among such persons upon the authority of any legislative delegate. Examples of such statutes in New Jersey are R.S. 17:9A-263, R.S. 17:12A-90, R.S. 48:2-36, R.S. 49:1-19. The Waterfront Commission legislation is the only instance in New Jersey of a *delegated* power to confer immunity; and there is no general immunity statute in New Jersey, the legislation in this area being limited to specific fields of governmental regulation as in the statutes just cited. All of this strongly suggests that the unique bestowal upon the Waterfront Commission of a delegated power for discretionary granting of immunity ought not to be administered except in the strictest accordance with the terms of the statute; and, indeed, that the statute itself ought to be regarded with judicial caution when, as is so dramatically instanced in our case, the statute seems to lend itself to so capricious a form of administrative exercise.

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* We realize of course that this does not present a "federal question". But it is part of the overall picture of slackness that we are describing, and as such it enters into the overall evaluation of federal constitutionality.

A further reason for viewing the statute itself with constitutional caution arises from the fact that the statute permits the Commission to delegate, unrestrainedly, its own delegated immunity power to any of its subordinate employees. Such a sub-delegation occurred in our case.* The Commissioners themselves are at least officials whose appointments stem from the highest executive authority in the respective states; the Commission's employees are, with all due respect, much farther removed from the elected officials who are the directly chosen trustees of the popular sovereign. The statute does not even well define the circumstances in which such unrestrained sub-delegation shall be permitted, saying merely that the Commissioners may designate Commission employees to act in the place of the Commissioners "wherever [they] shall be unable to attend a meeting of the Commission" (N.J.S.A. 32:23-9, 86). What does "unable to attend" mean? In this case the letters of designation of the employees to act in the place of the Commissioners are dated October 13, 1961, are worded unlimitedly *in futuro*, and were put to use on October 27, 1961.* Should a gubernatorially-appointed officer be permitted to strip himself of what is probably his most solemn statutory function in this indiscriminate manner? The distressingly casual way in which the blanket sub-delegation was done in this case is perhaps not surprising in view of all the various other indications that the Commission's representatives deem themselves empowered to conduct their investigative programs free from the inconveniences imposed by the due process clause. The seriousness of this kind of unrestrained sub-delegation of investigative power was expressly remarked upon in *Cudahy Packing Co. v. Holland*, 315 U.S. 357, disapproving a sub-delegation of the exercise of the subpoena power. The Court said, "Unlimited authority of an administrative officer to delegate the exercise of the subpoena power is not lightly to be inferred. It is a power capable of oppressive use, especially when it may be indiscriminately delegated * * *". How much more forcefully true are these words when we apply them to the infinitely greater power of conferring immunity to wipe out a citizen's constitutional privilege against self-incrimination?*

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* See the repeated references in the record to the Commission's "designees" (e.g., R. 47, 72, 83).

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* Not printed in the Record, but see the printed Appendix in the Court below at D104a to 105a.

POINT II

Petitioners' conviction of what was rather incongruously termed "civil contempt", was in contravention of their Fourteenth Amendment rights of due process and fair trial.

The grounds of the contention stated in the above point heading were summarized in our "Question Presented" #3, *supra*, where we noted the following incidences of unfair trial in this case:

The only factual matters "tried" in this pecularily commingled proceeding involving charges of both "criminal" and "civil" contempt** were (1) the issue of petitioners' grounds for fearing Federal incrimination (which, however, the appellate court below treated as immaterial in view of its holding that the State-conferred immunity need not extend to Federal incrimination), and (2) the facts as to the actual happenings shown on the record of the interrogation before the Waterfront Commission (which were not disputed) i.e., that the petitioners were asked certain questions, refused to answer them, invoked the privilege against self-incrimination, were given immunity, still refused to answer, etc.

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* We add, also, as a still further failure of compliance with the statute that it by no means appears in this case that *all* of the District Attorneys of the two states "having an official interest" in the subject matter (N.J.S.A. 32:23-86) were notified (R. 83-89).

Cases illustrating the jealousy with which statutory delegations of a discretionary power to confer immunity are guarded by the courts against exercise of the power by unauthorized persons are, e.g., *State ex rel. Kowaleski* v. *District Court of Milwaukee County*, 254 Wis. 363, 36 N. W. 2d 419 (1949); *People* v. *Indian Peter*, 48 Cal. 250 (1874).

**We return *infra* in this Point II to this commingling feature and its consequences in point of due process.

There was no trial, however, of the petitioners' claims that, in effect, they had no contemptuous intent and that their resistance to the Waterfront Commission's interrogation was grounded in good faith upon valid legal considerations.

Those legal considerations included the following: (a) that petitioners were facing an accusatory and potentially punitive interrogation, entitling them to disclosure of the "case" against them and opportunity to defend; (b) that the failure and refusal of the commission to afford to the petitioners the requested opportunity to make a rational judgment of the necessity and advisability of invoking the privilege against self-incrimination, which opportunity would have entailed apprisal to the petitioners of the Commission's damaging information against them (if any) and confrontation and cross-examination of accusatory witnesses, worked a denial of due process of law in forcing the petitioners to exercise in the dark the onerous choice involved; and (c) that this failure and refusal of the Commission, and the concomitant denial of all the petitioners' requests for discovery, deprived petitioners of their fair constitutional opportunity to make a rational judgment as to whether the Commission's interrogation represented a bona fide inquiry into waterfront "crime" or whether, on the contrary, the Commission was merely still trying to intrude itself (as petitioners had claimed from the outset) into a federally pre-empted "N.L.R.B." area involving a "labor dispute".

Before discussing these several incidences of unfair trial which we claim, a few words are needed concerning the fact that technically this matter is before the Court on the present record on the basis of a judgment of conviction of "civil" contempt—the charge on which petitioners were tried and convicted having combined both "criminal" and "civil" contempt, but the Supreme Court of New Jersey having reversed on the charge of criminal contempt while affirming on the charge of civil contempt. As we noted in the Statement, *supra,* this action of the Court below was on the ground that the commingling of the two forms of contempt charges and the way in which the trial was conducted had resulted in denying petitioners a fair trial on the issues of criminal contempt. The opinion below on this subject reads as follows (R. 239-240):

> "However, we think that the judgments holding the defendants guilty of criminal contempt must be reversed. In *N.J. Dept of Health* v. *Roselle,* 34 N.J. 331, 344 (1961), we expressed grave doubts whether a defendant's rights could be adequately protected in a "double-barrelled proceeding," where charges of both civil and criminal contempt [fol. 324] are tried in a common hearing. Although the defendants did not specifically object to the dual aspects of the trial below, they did make known their desire to have an opportunity to introduce evidence on the question of intent to commit a criminal contempt. From our examination of the record, it appears that the defendants were exposed to criminal punishment without being afforded the opportunity to present evidence

> in their defense, if any, and in extenuation of the offenses charged and in mitigation of the penalties to be imposed. The trial court's refusal to hear any evidence, except for the limited purpose of pinpointing the areas of possible federal incrimination, denied the defendants the safeguards to which they were entitled as persons charged with criminal offenses. See *Cooke* v. *United States,* 267 U.S. 517, 537, 69 L.ed. 767, 774 (1924); *N.J. Dept. of Health* v. *Roselle, supra,* at 338-340."

The above quoted ruling of the Supreme Court of New Jersey on the question of the legality of the trial on the charges of criminal contempt is unexceptionable, as far as it goes. Our contention is that it does not go far enough even in regard to the criminal contempt, and that it is entirely wrong with regard to the so-called "civil" contempt. We use the term "*so-called*" civil contempt because in every realistic sense the petitioners are here before this Court as persons who seek redress against an unconstitutional contempt conviction whose denomination as "civil" is sheer nominalism under all of the circumstances presented.

As earlier noted, the Commission was content with a proceeding against the present defendants limited to "civil" contempt in the prior proceedings (1960), but the Commission sought both "civil" and "criminal" contempt convictions in the instant (1961) proceedings. Furthermore, the Commission's attorney in the instant contempt trial even saw fit to try to make the Court believe (apparently the attempt succeeded) that the issues in this combined trial for civil and criminal contempt were indistinguishable from those in the prior trial for civil contempt alone.* By this conduct of the Commission's attorney in the contempt trial there was achieved a prejudicial importation of the lowest standards of contempt "trial" and there resulted a pervasive slackening of the procedural tone and quality of the entire commingled case.

This contempt case, then, was never really "tried" at all, yet it resulted in an intermingled sentence which included fine and imprisonment for a specific term—a sentence indistinguishable *pro tanto* from that which one would expect in a case of "criminal" contempt.**

The applicable New Jersey statutes and Rules of Court do indeed render all but indistinguishable these supposedly distinct rubrics of "criminal" and "civil" contempt. See Appendix, *infra*.

Cf. also the well-known dissenting opinion of Mr. Justice Rutledge in *United States* v. *Mineworkers*, 330 U.S. 258, at pp. 364 *et seq.*, which discusses the uncritical and nominalistic tendency on the part of trial courts in contempt proceedings to lump together indiscriminately the incidences of the rights of fair trial procedure in "criminal" and

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* This interesting item was unfortunately not designated by us for printing in the Record herein. It appears, however, in the printed Appendix in the Court below at pp. 180a, line 38, to 181a, line 7, and it reads as follows:

> "* * * there is no issue of fact involved in this proceeding of any kind which requires testimony or a trial. This is exactly the same type of proceeding which was originally before Your Honor where Your Honor held these same defendants in contempt without a trial of any kind, and which order of contempt was affirmed by the Supreme Court of New Jersey".

** This intermingled sentence has not been effectually straightened out by the reversal of the "criminal" contempt conviction. See p. 20, *supra*.

"civil" contempt, to the special procedural disadvantage of a defendant faced with both of these types of contempt charges where, as here, the "civil" contempt results anyhow in a punishment in part identical to that which the "criminal" contempt would produce.

The sacrifice of individual rights which inevitably occurs in this sort of indiscriminate application of the supposed theory of "summariness" in contempt cases, is dramatically illustrated in the present case, where the Trial Court, despite the repeated importunities of defense counsel, blocked all attempts of the defense, except on the single issue of valid fear of federal incrimination, to obtain for the defendants a minimally adequate trial of the conventional issues of intent, motivation, justification and the like.

We turn next to a more detailed consideration of these last-mentioned issues as to the scope of the defenses which are (or ought to be) allowed in a "civil" contempt trial of the particular commingled kind here involved. The authorities which we shall cite and discuss on this topic have dealt largely with the so-called "criminal" contempt, but it is our respectful contention that they are applicable here in view of the peculiar commingled orientation in which our so-called "civil" contempts are presented.

It is familiar that the general ambit of defenses in a trial for criminal contempt is not discernibly different from that in prosecutions for crime. E.g., *Cooke* v. *United States,* 267 U.S. 517, 536-539.

The right of a defendant in such a trial to assert his defenses is founded in constitutional due process. *Cooke* v. *United States, supra.* Cf. *United States* v. *United Mine Workers,* 330 U.S. 258, 363-376 (dissenting op.)

Specifically, the defense of lack of intent, together with related defenses as to motive, good faith, justification, and the like, and, in general, full right to make "defense or explanation," are accorded to defendants in criminal contempt trials. The leading case is, again, *Cooke* v. *United States,* 267 U.S. 517, 536-539.

The defense of lack of intent assumes additional importance because New Jersey is one of the state jurisdictions which still recognize an at least qualified right of expurgation by disavowal of contumacious intent. In *Clark* v. *United States,* 289 U.S. 1, 17, this Court abrogated the expurgation doctrine in federal contempt proceedings and said, "It has been rejected generally in the states," citing for New Jersey the case of *In re Singer,* 105 N.J. Eq. 220, 147 Atl. 328. This Court was apparently unaware in the *Clark* case that the ~~*Singer* decision in 1~~05 *N.J. Eq.* had been reversed by New Jersey's Court of Errors and Appeals in *In re Singer,* 109 N.J. Eq. 103 (E. & A. 1931). This subsequent decision in 109 *N.J. Eq.* (at p. 105) expressly preserves the doctrine that "Disavowal of any intention to commit a contempt may, however, extenuate or even purge the contempt." The *Singer* decision in 109 *N.J. Eq.* has never been disapproved or even criticized. It is apparently still the law ~~in New Jersey.~~ Earlier New Jersey decisions permit of no doubt that some form of the expurgation doctrine, combined occasionally with a right of defense or justification, long ago became rooted in that State. *In re Cheeseman,* 49 N.J. L. 115, 143 (S. Ct. 1886) ("a fair opportunity of denying or confessing [the] truth [of the charges]") (cited with approval in *In re Frank,* 135 N.J.L. 429, 432 (S. Ct. 1947), which in turn is cited with approval in *In re Tiene,* 17 N.J. 170, 180 (1954); *In re Gonzales,* 88 N.J.L. 536 (S. Ct. 1910); *In re Schmidt,* 8[illegible] N.J. Eq. 21, 24 (Ch. 1917). The petitioners in this case were shut off from all opportunity to develop the defensive facts, concerning their intent, that might have obtained for them a purgation or at least a mitigation of sentence under the doctrine above mentioned. This foreclosing of opportunity for defense was not harmless because the defense in question, as seen, has vitality and reality in New Jersey. The foreclosing of opportunity was the product of the way in which the summary procedures of the "trial" below were applied to the petitioners.

Apart from the above questions as to the doctrine of expurgation as such, the defense of lack of intent is constitutionally indefeasible because of its bearing on mitigation of punishment. *Cooke v. United States,* 267 U.S. 517, 538, which, as seen, formulates in due process terms the right to defend on the issue of intent, expressly holds also that even where the allegedly contumacious statement is admitted by the defendant as having been made by him, "the intention * * * must necessarily and properly have an important bearing on the degree of guilt and the penalty which should be imposed, [and] the court cannot properly exclude evidence in mitigation. It is a proper part of the defense." New Jersey cases in accord are: *In re Singer,* 109 N.J. Eq. 103, 105 (E. & A. 1931); In *In re Cooley,* 95 N.J. Eq. 485, 487-488 (Ch. 1924), aff'd, 103 N.J. Eq. 377 (E. & A. 1928); *In re Henn,* 113 N.J. Eq. 155, 158 (Ch. 1933), order to show cause discharged, 114 N.J. Eq. 452 (Ch. 1933); *In re Hand,* 89 N.J. Eq. 469, 470 (Ch. 1918).

The total closing off of the petitioners' opportunity to introduce their proofs as to intent, motivation, good faith and the like, or to make "defense or explanation" was a denial of Fourteenth Amendment due process.*

This closing off of the petitioners' right of fair trial was, needless to say, not justified on any theory drawn from the "summary" power to punish for contempts committed in the face of the court or otherwise deemed proper to be punished summarily as "constructive contempts." See *Green* v. *United States*, 356 U.S. 165, 193, separate opinion of Mr. Justice Black (joined by the Chief Justice and Mr. Justice Douglas); *Sacher* v. *United States*, 343 U.S. 1, 5 (also see Id., 36-37 Justice Frankfurter, dissenting); *In re Oliver*, 333 U.S. 257, 275, 277-278; *Cooke* v. *United States*, 267 U.S. 517, 536. See also *Fisher* v. *Pace*, 336 U.S. 155, 167 (Mr. Justice Murphy, dissenting); *United States* v. *Sacher*, 182 F. 2d 416, 463-466 (C.A. 2, 1950) (Judge Clark, dissenting), affirmed, 343 U.S. 1; Annotation, 96 L. Ed. 762, 766-767.

With the foregoing authorities in mind, let us now consider more specifically the ways in which the petitioners were unconstitutionally circumscribed in their right to make defense in the contempt "trial" below.

It will be recalled that the Trial Judge declined to take testimony on any issue except that of the petitioners' reasonable fear of federal incrimination. The trial issues presented by the general denial in the petitioners' answer to the motions for contempt (R. 90) included important issues of fact—notably intent. The petitioners had carefully prepared, for the convenience of the Trial Court and in their own defense interests, a schedule of successive and alternative procedural positions with a view to avoiding any inadvertent procedural slippages that might result in denial of an adequate trial. The Trial Court was asked by the defense to pass first on the issues of law presented (principally the failure to grant immunity against federal incrimination), to consider next the defense motions for discovery (which were important for proper trial determination of the crucial constitutional issue of adequate apprisal to the witnesses during the Commission's interrogations with a view especially towards enabling the Trial Court to determine whether the defendants had been denied due-process of law in being forced in the dark to take the onerous plea of self incrimination),* and, finally, to grant a jury trial** if the motions for contempt were not denied for reasons of law alone. The Trial Court did of course pass on all of these defense proposals, but it did so in a telescoped manner which left the defense high and dry without any trial whatsoever on any of the issues of fact except the fear-of-federal-incrimination issue as above mentioned. The way in which this telescoping came about was, simply, that the Trial Court after entertaining extended oral argument throughout the entire course of which the ourt kept announcing its unalterable resolve not to take testimony, and after hearing testimony solely on the issue of fear of incrimination, concluded the hearing with determination of all issues against the defense. See R. 99-116, 140, 143-165.

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* We develop *infra* the details of what these proofs as to intent, etc., could have included.

The defense requests for discovery were especially important, and we think we may fairly say that these requests received no more than perfunctory consideration. Thereby was excluded from any possibility of adequate "trial" consideration the entire area of issues which would have opened up the due process inquiry as to the overall fairness of the Commission's interrogational procedure with its numerous gyrations and shifts of position (see Point VI, *infra*), and with its overall obscuration of just what it was that the Commission thought to be the legal justification for its use of its compulsory processes against Murphy and Moody. Down to this moment no one can say on the instant record as an entirety whether the Commission sincerely wants to question Murphy and Moody about waterfront thefts, or about some kind of general supposed labor union high-handedness in regard to the acceptability of Markley as a port watchman, or about other unspecified affairs of the Longshoremen's Union in regard to the subject matter of the May, 1960 work stoppage. It is impossible to know at all meaningfully (much less with any precision or exactitude) what the Commission considers to be the supposedly legitimate purpose of its interrogation of Murphy and Moody and, latterly, of its resort to the immunity powers against Murphy and Moody.

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* See further as to this *infra* in this Point II.

** See Point IV, *infra.*

We dwell upon these uncertainties in the Commission's overall position because those uncertainties bring forward in the most urgent way the question of the petitioners' alleged intent to commit contempt. Our thought in this regard is that a witness who sincerely claims that he sincerely lacks a contemptuous intent in declining to answer official questions because the official questioner will not enlighten him as to the subject matter with sufficient explicitness to enable the witness to make a rational judgment as to whether he is legally obliged to answer the questions, is entitled to a full trial of fact on these issues of his intent and of his state of mind when he is brought up on a charge of contempt.

And in this connection we are to emphasize with all respectful earnestness that not only did the Trial Court make no finding of willfulness in this case, but in fact that Court expressed its approving and seemingly sympathetic opinion that the petitioners had not been contemptous in their resort to their various legal objections (R. 173). How, then, the petitioners could have been found guilty of contempt remains a mystery—unless, to be sure, as the Commission contends, the only issue of "intent" in a case of contempt is the sheer first-year-law school issue of "intent" to perform the mere act itself of declining to testify.

* * * * *

We turn next to more detailed treatment of another of the items mentioned in our "Questions Presented" #3, where we assembled the various incidences of denial of fair trial in this case. Because the point now to be mentioned is deemed by us to be of special interest in the constitutional setting of this case as a whole, we take the liberty of first sumarizing it in bold type:

> **The failure and refusal of the Commission to afford to the petitioners the requested opportunity to make a rational judgment of the necessity and advisability of invoking the self incrimination privilege, which opportunity would have entailed apprisal to the petitioners of the Commission's damaging information against them (if any) and confrontation and cross-examination of accusatory witnesses, worked a denial of due process of law in forcing the petitioners to exercise the onerous choice involved. The denial of discovery by the courts below was therefore error.**

We believe that the contention of law embodied in the above point is *de novo* in any jurisdiction, hence authorities directly in support thereof are naturally not forthcoming. Nevertheless, we earnestly urge that the point is sound, and that investigative or other inquisitional bodies should not be permitted, as a matter of due process of law, to put citizens in the position of having to decide in the dark whether or not they should incur the grievous legal and social disadvantage of invoking the privilege of self-incrimination. The point we here urge is especially compelling, where, as in this case, the setting of the inquisition is not merely investigative but also accusatory and punitive.

We respectfully recall the efforts which we made in the Commission proceedings herein to induce the Commission to disclose any damaging information it had, and to produce its accusatory witnesses, if any.

Also, as seen, we moved (without avail) for full pretrial discovery in the court below.

As being of doctrinal relevance, albeit only in a general sense, we call attention to the familiar decisions requiring adequate apprisal of the jurisdictional purpose or pertinency of official interrogation of witnesses. E.g., *Watkins v. United States*, 354 U.S. 178; *Scull v. Commonwealth of Virginia*, 359 U.S. 344.

Of more immediate doctrinal relevance to our situation is the treatment in the dissenting opinion of Mr. Justice Douglas in *Hutcheson v. United States*, 369 U.S. 599, 638 *et seq.*, where "fundamental unfairness" in handicapping persons in regard to their choice of whether or not to use the privilege against self-incrimination was decried as a violation of due process of law. *Mutatis mutandis,* this interesting treatment in the *Hutcheson* dissent comes close to paralleling our point herein that we were denied due process in the setting of the self-incrimination issues in this case as a whole.

Related to this latter theme of ours is the following: The refusal of the Commission to apprise petitioners of the damaging information against them (if any) on the subject of supposed "Waterfront crime", the like refusal to allow confrontation and cross-examination of accusatory witnesses, and the concomitant denial of all of the petitioners' requests for discovery, deprived petitioners of their fair constitutional opportunity to make a rational judgment as to whether the Commission was conducting a bona fide inquiry into waterfront "crime" or was merely still trying to assert authority (as we had claimed from the beginning) over a "labor dispute". This presents the question of the sincerity of the petitioners' motivation in declining to answer the Commission's questions on the ground of N.L.R.B. preemptive jurisdiction. This issue had been expressly reserved in our answer to the motions for contempt (R. 91, see Second Separate Defense). Our Jurisdictional Statement in the prior appeal in this Court presented our exposition on that issue of Federal preemption. We now respectfully submit that this issue stands revived, notwithstanding the prior litigation and we treat the issue in Point VI, *infra.*

Further as to the question of why we deemed ourselves entitled to discovery in regard to the issues of (1) our right to information on which to base a rational choice of whether to invoke the privilege, and (2) our right to information on which to make such choice in regard to the "labor dispute" versus "crime" aspect, we call attention to the following:

The New Jersey Rules of Evidence adopted in 1960 provide (N.J.S.A. 2A:84A-32, Rule 40, para. (2)) that:

> "(2) If a witness refuse to answer a question, under color of a privilege claimed pursuant to Rules 23 through 38, after the judge has ordered the witness to answer; and a contempt proceeding is brought against the witness, the court hearing the same shall order it dismissed if it appears that the order directing the witness to answer was erroneous."

The petitioners herein contend that the Commission's orders of immunity directing them to answer were "erroneous" within the meaning of the above quoted statute and Rule. Those immunity orders were erroneous for the several reasons argued in this brief, and summarized in our separate defenses in our Answer to the contempt motions (R. 90). For example, if we are correct in our argument that the Commission pressured and maneuvered the petitioners into an alleged contempt by conducting the interrogation and the proceedings for conferral of immunity in a manner contrary to due process or in violation of statute, then the petitioners are not in contempt because the orders directing them to answer are "erroneous."

In nearly every facet of this case a full and fair determination as to the validity or erroneousness of the orders to testify entailed a substantial further judicial inquiry of fact; wherefore, there was entailed also the need to afford the petitioners adequate opportunities for pretrial discovery in aid of such judicial inquiry of fact. Thus, if we are correct that we were denied due process of law by being maneuvered into invoking the privilege against self-incrimination and into incurring the disadvantages of immunity (this due process violation, as seen, inheres in the fact that we were not given a rational opportunity to make our choice on the basis of a really meaningful apprisal of just what accusatory facts the Commission claimed to have and who its witnesses are), then it would follow that we were entitled to discovery to elucidate those aggrievements. Similarly, we were entitled to discovery on the issues of the Commission's purported delegation of power to administrative subordinates; and as to the issues of notification to the law officers of the states of New York and New Jersey. Above all, we were entitled to such discovery on the issue of whether the subject matter of the Commission's questioning of the petitioner-witnesses came within the Commission's jurisdiction at all, as involving waterfront crime, or was within the area of federal preemption under the Federal Labor Management Relations Act as a labor dispute.

The contempt "trial" herein was a travesty on Fourteenth Amendment due process.

POINT III

Petitioners have been denied the equal protection of the laws under the Fourteenth Amendment in that the rulings below deny to persons interrogated by the Waterfront Commission the benefit of the General New Jersey Evidence Statute which defines [illegible]f-incrimination to include Federal incrimination.

Under new Rules of Evidence adopted in New Jersey in 1960 (N.J.S.A. 2A:84A-17 *et seq.*) the privilege against self-incrimination expressly extends to federal incrimination. This 1960 legislation provides in pertinent part:

> "CHAPTER 84A. RULES OF EVIDENCE
>
> "ARTICLE II. PRIVILEGES
>
> * * *
>
> 2A:84A-18. Definition of incrimination.
>
> Rule 24.
>
> Within the meaning of this article, a matter will incriminate (a) if it constitutes an element of a crime against this State, or another State *or the United States*, or (b) is a circumstance which with other circumstances would be a basis for a reasonable inference of the commission of such a crime, or (c) is a clue to the discovery of a matter which is within clauses (a) or (b) above; provided, a matter will not be held to incriminate if it clearly appears that the witness has no reasonable cause to apprehend a criminal prosecution. In determining whether a matter is incriminating under clauses (a), (b) or (c) and whether a criminal prosecution is to be apprehended, other matters in evidence, or disclosed in argument, the implications of the question, the setting in which it is asked, the applicable statute of limitations and all other factors, shall be taken into consideration. L. 1960, c. 52, p. §18.

> 2A:84A-19: Self-incrimination: exceptions
>
> Rule 25.
>
> Subject to Rule 37 every natural person has a right to refuse to disclose in an action or to a police officer or other official any matter that will incriminate him or expose him to a penalty or a forfeiture of his estate * * *
>
> * * * * *
>
> 2A:84A-32. Effect of error in overruling claim of privilege
>
> Rule 40.
>
> * * *
>
> (2) If a witness refuses to answer a question, under color of a privilege claimed pursuant to Rules 23 through 38, after the judge has ordered the witness to answer, and a contempt proceeding is brought against the witness, the court hearing the same shall order it dismissed if it appears that the order directing the witness to answer was erroneous. L. 1960, c. 52, p. §32. (Emphasis supplied.)

Construing the above 1960 legislation, the Supreme Court of New Jersey in *Nusbaum* v. *Newark Morning Ledger Co.*, 33 N.J. 419 (1960), said:

> "The latter enactment, which now must be applied in this controversy, adopted certain rules of evidence and broadened the scope of the pre-existing protection against self-incrimination. Rule 25 provides:
>
> > '* * * (E)very natural person has a right to refuse to disclose in an action * * * any matter that will incriminate him or expose him to a penalty or a forfeiture of his estate * * *.' Article II, section 19.
>
> "Under Rule 24 a matter which will incriminate is defined as that which will constitute (a) an element of a crime against 'this State, or another State or the

United States, or (b) is a circumstance which with other circumstances would be a basis for a reasonable inference of the commission of such a crime, or (c) is a clue to the discovery of a matter which is within clauses (a) or (b) * * *.' Article II, section 18. The section adds a proviso that the matters described will not be held to incriminate if it clearly appears that the witness has no reasonable cause to apprehend a criminal prosecution.

"Prior to the appearance of the 1960 statute the protection afforded a witness against self-incrimination related only to disclosure of crimes against this State. Report of the (Legislative) Commission to Study the Improvement of the Law of Evidence, p. 29 (1956). Now the privilege protects against revelation of violation of the criminal law of any state or the national sovereignty. Moreover, the comprehensive definition of incriminatory matter adopted by the Legislature was taken from the cited Report, page 29, which acknowledges its source as the United State Supreme Court in United States v. Hoffman, 341 U. S. 479, 71 S. Ct. 814, 95 L. Ed. 1118 (1951). Although the Hoffman case was decided in 1951, the connotation expressed therein was not new. It is traceable to the early jurisprudence of our country. For example, over 150 years ago Chief Justice Marshall, in the trial of Aaron Burr, said:

> 'Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself: United States v. Burr, 25 Fed. Cas. 38, at p. 40, F. Cas. No. 14692e (1807).'

Accordingly, in order to reach a decision in this case as to the right of the witnesses to refuse to answer

> questions in categories (1) and (2) set forth above, it is only necessary to consider whether the matter inquired about constitutes an element of a crime against the United States, or a circumstance which with other circumstances would be a basis for a reasonable inference of the commission of such a crime, or a clue to the discovery of such a crime or of such a circumstance."

Incidentally, the Court went on in the *Nusbaum* case to note that the subject matter of the attempted interrogation in that case—Communist Party membership—was such as to "clearly give reasonable cause to apprehend a criminal prosecution by the federal authorities". The Court reached this conclusion without any specific showing in the record that the federal prosecutive authorities were or might be actually interested in prosecuting the witnesses involved in the *Nusbaum* case; it was deemed sufficient by the Court in that case that the possibility of such federal prosecution existed as a matter of (1) federal statutory and case law pointing to a relevant offense, and (2) alleged facts of an incriminatory nature relevant to such a federal offense. The Court's above-quoted language indicates that where such a potentially applicable federal criminal statute exists, the New Jersey 1960 legislation, in effect, makes it the burden of the official body coercively seeking testimony to make it "clearly appear", as Rule 24 of the 1960 Act requires, that the witnesses have "no reasonable cause" to fear prosecution by the federal government.

The *Nusbaum* cases recognizes, as seen, that no grant of immunity is constitutional unless it is coextensive with the privilege against self-incrimination that the witness is invoking. E.g., *Counselman* v. *Hitchcock*, 122 U. S. 547; *Ull-*

mann v. United States, 350 U. S. 422; *Feldman v. United States,* 322 U. S. 487. Applying this well-known principle here, it seems that it should have followed as the night the day that the Waterfront Commission's purported grant of immunity to Murphy and Moody was invalid because it was not as broad as the privilege against self-incrimination under the generally applicable law of New Jersey which, as seen, now extends in the most liberal and all-inclusive manner to matters looking to the possibility of federal incrimination—the Commission's purported "immunity" having expressly eliminated any area of such federal incrimination.

The court below declined to follow the above quoted 1960 New Jersey legislation on the ground that the Commission's own immunity legislation has not been "repealed" by the 1960 legislation.

Such construction of the New Jersey statutes by the highest court of that state will not be reconsidered, we well realize, in this Court. The result stands, therefore, that the law of New Jersey discriminates between persons interrogated by the Waterfront Commission on one hand, and all other persons who may be called upon to decide whether to invoke the privilege against self-incrimination. The present petitioners, then, are members of a "class" which is the only class of persons in New Jersey who are subject to having conferred upon them compulsory immunity without protection against federal incrimination. Under the present law of New Jersey no one else could be held in contempt for refusing a State grant of immunity which did not extend to federal incrimination.

We submit that it would be difficult to imagine a more stark case of denial of the equal protection of the laws. It is hardly necessary to cite authority for the proposition that the equal protection clause was designed to prevent not only persons but *classes* from being singled out as a special subject of discriminatory legislation. E.g., *Pembina Consolidated Silver Min. & Mill Co.* v. *Pennsylvania*, 125 U.S. 181; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U.S. 362; *Hernandez* v. *Texas*, 347 U.S. 475.

POINT IV

Where "civil contempt" is for all practical purposes criminally punitive and substantially indissoluble from "criminal contempt", whether in a single intermingled proceeding or not, a new constitutional requirement of jury trial in "civil contempt" should be enunciated by this Court as a part of due process of law.

At the time this is written the Court has not yet rendered its decision in the pending case of Governor Barnett of Mississippi. Our ensuing discussion of the jury trial point stated in the above heading will of course be read by the Court with this last mentioned circumstance in mind.

It should also be borne in mind in reading this Point IV that we are explicitly endeavoring to assimilate into the doctrinal area of "criminal contempt", that so-called species of "civil contempt" to which we have referred in the above point heading, and which we believe to be present in this case as urged in our Point II, *supra*. With this last in mind, then, we proceed to a discussion of the authorities on the constitutional aspect of jury trial in "criminal" contempt—there apparently being no significant authority as to this on the peculiar kind of "civil contempt" here involved.

One further preliminary is, of course, to recall to the Court that our express request for jury trial in the proceedings below was denied.

Green v. *United States*, 356 U.S. 165, is not necessarily dispositive of our contention that the petitioners' federal constitutional rights were violated by such denial. The *Green* case dealt with federal not state power. This difference is not nominalistic. For it entitles us to point out that the exhaustive scholarship devoted by the Court to the jury trial-contempt problem in the *Green* case did not touch state-derived issues as such, either generally or with respect to important special facets which are presented by the instant case. Nor has the Court considered the state-level question *de novo* since it first held seventy-five years ago, in *Eilenbecker* v. *District Court*, 134 U.S. 31, that the Federal Constitution does not require a jury trial in state prosecutions for criminal contempt.[*] Indeed, as shown in the accompanying footnote,[**] in the few instances in which the Court has subsequently cited the *Eilenbecker* case, it has done so without new comment; and only two of those were state contempt cases, where, respectively, a jury had not been demanded (*Tinsley*), and an attorney was behaving defiantly *in facie curiae* and was convicted *instanter* (*Fisher*).

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[*] *Eilenbecker* involved violation of an injunction. The constitutional issue of denial of jury trial was there presented in a factual setting strikingly more unfavorable to the accused than are our facts. The Court found that there could not be "any doubt" either as to "the intentional violation" or that the violators "had a regular and fair trial after due notice, and opportunity to defend themselves in open court * * *" 134 U.S. at 36.

[**] *Eilenbecker* has been cited by this Court in *In Re Debs*, 158 U. S. 364, 596 (federal contempt); *Tinsley* v. *Anderson*, 171 U. S. 101, 108 (state contempt jury trial not demanded); *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 337 (federal contempt); *United States* v. *Shipp*, 203 U. S. 563, 575 (contempt of this Court, *Eilenbecker* cited for another point); *Myers* v. *United States*, 264 U. S. 95, 104 (federal contempt); *Nye* v. *United States*, 313 U. S. 33, 48 (federal contempt, *Eilenbecker* cited for another point); *Fisher* v. *Pace*, 336 U. S. 155, 159n. (state contempt, attorney disobeying court's limitation on argument); *Green* v. *United States*, *supra* (federal contempt). See also the dissenting opinions in *Bridges* v. *California*, 314 U. S. 252, 286 (state contempt, conviction reversed), and *United States* v. *United Mine Workers*, 330 U. S. 258, 367n. (federal contempt).

We, therefore, submit that the question of the constitutional requirement of jury trial in state contempt is not foreclosed in this Court on the present record.

Nor is this question disposed of by the New Jersey requirements for "de novo" review in the Appellate Division in contempt proceedings, such review obviously not being a substitute for a jury trial and in any event being limited at most, it would seem, to review on the record. See (N.J.S. 2A:10-3, formerly R.S. 2:15-3; see also N.J.R.R. 1:5-2); and *Zimmerman* v. *Zimmerman*, 12 N.J. Super., 61, 68-69 (App. Div. 1950), cited with approval in *Board of Health, Weehawken Tp.* v. *N.Y. Central R. Co.*; 10 N.J. 284, 293 (1952); *Van Sweringen* v. *Van Sweringen*, 22 N.J. 440, 450 (1956).

POINT V

If the Court should entertain petitioners' contention that they were entitled to fuller apprisal as to the factual basis of the Commission's interrogation on the question of "crime" versus "labor dispute", or if the Court should entertain the Commission's contention of waiver and estoppel of petitioners' privilege on the theory that petitioners believed no "crime" and only a "labor dispute" was involved, then the Court should also entertain and decide the question of whether the area of the Commission's interrogation in this case is preempted by the Federal Management Relations Act; and the Court should rule that such preemption does apply.

In the prior contempt case involving the same parties who are now before the Court (Oct. Term, 1961, No. 362, appeal dismissed 368 U.S. 32), petitioners unsuccessfully sought review of a decision of the Supreme Court of New Jersey (35 N.J. 62, 171 A. 2d 295) which held that the preemptive effects of 29 U.S.C.A. §§ 157, 158 and of related provisions of the Labor-Management Relations Act did not operate upon the subject matter of this case so as to deprive the Waterfront Commission of the jurisdiction and authority asserted by it in its subpoenas addressed to the petitioners and in its interrogation of them. The present case involves those same subpoenas and that same subject matter of interrogation.

In its opinion rendering the judgment here under review, the Supreme Court of New Jersey declined to re-examine its previous ruling, above mentioned, concerning the preemption issue. As shown earlier herein, that issue was fully preserved and properly urged by the petitioners in the instant renewed contempt proceedings at every necessary stage. In the context of the procedural posture of the record herein as depicted in our above Point heading V, and as developed in detail earlier in this brief, it may well become appropriate for this Court to give renewed consideration to the N.L.R.B. preemption issue. Accordingly, we submit the following as our argument on that issue:

The State Court decisions on the N.L.R.B. preemption issue here sought to be reviewed project a significant new inroad by state police power against the portion of the federal commerce power which Congress has exercised in the Labor-Management Relations Act (29 U.S.C.A. 141 *et seq.*) The court below comes to this result (see 35 N.J. 62; 171 A. 2d 295) by a simplistic reading of *DeVeau* v. *Braisted*, 363 U.S. 144.* *DeVeau* did not irretrievably blur, as do the decisions below (i.e., the two decisions of the Supreme Court of New Jersey in our case), the line that separates the Waterfront Commission's powers to deal with *crime*, from the federal Labor Board's power to deal with labor-management relations affecting commerce. *DeVeau* did not necessarily fatally endanger this dividing line, because the limited "criminal" subject-matter of the Commission's regulation in that case, i.e., the handling of union funds by convicted felons, does not touch pervasively the day-to-day course of the country's labor-management relations as a whole. A judicial finding of Congressional intent to let the federal pre-emptive authority over labor-management relations give way to the state power over crime in so restricted and readily definable a sector as was presented in *DeVeau* is one thing. The Court below, however, has found, on the ostensible authority of *DeVeau*, a Congressional intent to abdicate the federal purview in labor-management areas of seemingly illimitable extent. For, whereas the "crime prevention" theme of *DeVeau* touched (and only in the narrowest way) solely the matter of selection of union officers, the decisions below in our case apply that "crime prevention" theme in a way which touches all the myriad forms of happenings that may arise in non-amicable labor-management relations, every form of active-or-passive conduct by aggrieved or dissatisfied labor unions or employees—in short, the entire range of labor-management troubles envisaged by the term "labor dispute." We say that the decisions below have this sweep because they declare, virtually in so many words, that *any apparent threat*, posed by *any labor union conduct* (i.e., not only by strikes or other work stoppages), against the state-declared anti-crime policy of the Compact, abrogates *pro tanto* the National Labor Relations Board's pre-emptive powers. "It is unnecessary" even, the Court below has said (35 N.J. 62), "to decide whether the strike arguably falls within the protections or proscriptions of the LMRA." It is only "necessary," it seems, for the Commission to believe, in regard to "any activity," that such activity "appears" somehow inimical to whichever particular port watchman set-up of the Commission happens to be operative at any particular juncture or locale. In any such port watchman situation, then, or (so far as appears) in any other kind of situation within the extensive ambit of the Commission's regulatory powers, let there but be heard an official state outcry against waterfront "crime," and the whole carefully-built-up federal machinery for regulating labor-management relations becomes "unnecessary." "Unnecessary" too, whenever the bogey of "crime" is thus fetishistically invoked, becomes all inquiry as to *why* a particular union or local may actually be discontented with a particular incidence of the port-watchman system or of other Commission regulations. This last suggestion is not hypothetical. In this very case, with its utter lack of any record *proof* (as contrasted with the Commission's conclusory averments which, even so, were not spread upon the record until after the "contempts" had already occurred) of any improper-boding union conduct, or even intentions, regarding the port-watchmen system, and where therefore the work stoppage which is said to have denoted opposition to the new Chief Security Officer (Markley) cannot be said *in itself to* have denoted *improper* opposition to the security *system* or even to the individual officer, the commission has nevertheless been sustained by the Court below in its demand for the jailing of two labor union officials for contempt on the sterile and utterly speculative hearing "record" above described. For all that appears in the record (and we have shown how willing the petitioners were to elicit from the quite unwilling Commission a more meaningful "record"), the object of the work stoppage could have been to rally legitimate union sentiment among the membership in the face of the arrival on the scene of an authentic *bête noire* (Markley) who gravely imperilled legitimate union solidarity and security. On this wholly plausible and permissible assumption, the case would plainly have been one for N.L.R.B. pre-emption. Or, if the thus assumed object of the work stoppage (i.e., as having in fact been aimed at Markley *personally*) be said to have constituted an "unfair labor practice" by the union,

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* This Court's latest expression on the N.L.R.B. pre-emption issues (Retail Clerks Local 1625 v. Schermerhorn, Oct. Term 1962, No. 13, decided December 2, 1963—32 U.S. Law Week 4018) does not affect our situation.

N.L.R.B. pre-emption would likewise have attached. Not so, however under the doctrine of the decision below, which crowds out all such questions of "arguable" federal pre-emption (*San Diego Building Trades Council v. Garmon*, 359 U.S. 236) because it allows room only for a pre-emptive *state* power.*

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* Since the court below expressly laid aside as "unnecessary" all issues as to whether N.L.R.B. pre-emption would apply to the case in the absence of the Waterfront Commission legislation, we shall limit our further showing on the "arguability" point to the following: (1) Since it would be illegal under the Compact (N.J.S.A. 32:23-41) for a port watchman to be a member of appellants' union, the work stoppage here involved, if viewed as motivated by Markley's non-membership in said union, would be an "unfair labor practice" under the L.M.R.A. both as an improperly union-coerced discrimination (*e.g., N.L.R.B.* v. *International Brotherhood of Teamsters, Etc., Local 182*, 228 F. 2d 83 (C.A. 2, 1955); *N.L.R.B.* v. *Local 803, Etc.*, 218 F. 2d 299 (C.A. 3, 1955)), and as a demand for illegal contract rights (cf., e.g., *Davis* v. *Silverberg*, 14 Misc. 2d 744, 155 N.Y.S. 2d 321 (S. Ct. 1956); *International Typographical Union, Etc.*, 123 N.L.R.B. 806 (1959); *Local Union No. 1, Etc.*, 119 N.L.R.B. 1466 (1958)). (2) The assumedly coercive motivation of the work stoppage, i.e., coercively aimed against Markley's employment, is "arguably" an "unfair labor practice" under the L.M.R.A. in light of the undefined and broad ambit of federally redressible union-coerced employment-discrimination as evolved in cases such as [a] *Gimbel Brothers, Inc.*, 100 N.L.R.B. 870 (1952) (forcing discharge of employee who had long been deemed offensive by union leadership for reasons not related to conventional union interests); [b] *Radio Officers' Union, Etc.* v. *N. L. R. B.*, 347 U.S. 17 (broadened formulation of test of unlawful encouragement of union membership by discriminatory practices); cases following the *Radio Officers'* case are, e.g., *N.L.R.B.* v. *Local 542, Etc.*, 255 F. 2d 703 (C.A. 3, 1958); *N.L.R.B.* v. *Brotherhood of Painters, Etc.*, 242 F. 2d 477 (C.A. 10, 1957); *N.L.R.B.* v. *Philadelphia Iron Works*, 211 F. 2d 937 (C.A. 3, 1954); and cf., *re* the rule of the *Radio Officers'* case, e.g., *N.L.R.B.* v. *Imparato Stevedoring Corp.*, 250 F. 2d 297 (C.A. 3, 1957); *N.L.R.B.* v. *International Longshoremen's and Warehousemen's Union*, 210 F. 2d 581 (C.A. 9, 1954); *Baider* v. *Local 470, International Teamsters, Etc.*, 400 Pa. 188, 161 A. 2d 343, 346 (1960). (3) Further as to Markley's ineligibility for membership in appellant's union, cf. the cases cited in C.C.H.

The decisions sought to be reviewed exert too abrupt an impact—too abrupt to be ignored by this Court, we respectfully submit—on the "process of tentative, fragmentary illumination" which this Court has been carrying out so painstakingly in its efforts at emendation of the "Delphic" Congressional intent in this branch of federal-state relations over the past decade and more. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 241-242.

However, we emphasize the sheer *expansiveness* of the decisions below, more than their abruptness—expansion of the state police power at the expense of the federal commerce power. Rarely, and then only in cases of the most un-

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Labor Law Reporter, Labor Relations Vol's., ¶4135, par's. .0702, .109, .1092, .1095. (4) Cf. also *N.L.R.B.* v. *Local 743, Etc.*, 202 F. 2d 516 (C.A. 9, 1953) (unfair labor practice by union under 29 U.S.C.A. 158 (b)(1)(A) and 158 (b)(2) to demand that non-union employees be chosen from a union-approved referral list). (5) Since the Compact allows port watchmen to be members of a separate union (N.J.S.A. 32:23-41), cf. the cases holding it to be an "unfair labor practice" by a union under the L.M.R.A. to coerce discrimination against an employee in connection with such separate (or dual) union membership, e.g. *N.L.R.B.* v. *Local 169, Etc.*, 228 F. 2d 425 (C.A. 3, 1955); *N.L.R.B.* v. *Wagner Iron Works, Etc.*, 220 F. 2d 126 (C.A. 7, 1955), cert. den. 350 U.S. 981; *Local 791, Etc.*, 115 N.L.R.B. 1004 (1956); *Rupp Equipment Co.*, 112 N.L.R.B. 1315 (1955). (6) If the work stoppage is assumedly viewed as aimed at affecting Markley's work *assignment*, see 29 U.S.C[illegible] 158 (b)(4)(D), and cf., e.g., *McLeod* v. *Drivers and Cha[illegible]rs Local Union No. 816*, 178 F. Supp. 288 (S.D.N.Y. 1959), aff'd 227 F. 2d 800 (C.A. 2, 1960); C.C.H. Labor Law Reporter, Labor Relations Vol's. ¶4135, par's. .0855, 128. (7) Viewing Markley's port-watchmen functions as being wholly distinct, under the system established by the Compact (N.J.S.A. 32:23-29 *et seq.*), from "employment" of other employed personnel in whom appellants' union could lawfully be interested from the standpoint of labor-management relations, the assumed coercion aimed at Markley would "arguably" be an "unfair labor practice" under 29 U.S.C.A. §158(e) as an attempt to cause the employer "to cease doing business with any other person".

equivocally expressed Congressional intent, does the judiciary essay so dramatic an alteration of the balance of federal-state power in an area of prime national concern. It seems unthinkable that such an alteration should be judicially effected through "construction" of a Congressional intent which is so ambiguous (at best) as that here involved—an intent, moreover, which is expressed through the merely tangential medium of consent to an interstate compact.

Yet, it should perhaps occasion no surprise that this kind of expansive thrust should occur under the instant state legislation. The Waterfront Commission's legislative draftsmen have known well how to go about "supplementing" the original Compact which Congress approved in 1953 and has not post-audited since then. The provision in the original Compact allowing such supplementary legislation (N.J.S.A. 32:23-70) which this Court noted in *DeVeau* (363 U.S. at 150-151), has borne remarkable progeny which this Court has not hitherto had occasion to examine. We refer especially to the sweeping post-1953 enlargements of the Commission's powers of investigation and punishment;* although perhaps more notable still is the astonishing change in the definition of the word "compact" itself to give to the "supplementary" provisions, adopted without Congressional post-consent, the aura of the original "compact" provisions (N.J.S.A. 32:23-85(7)).

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* E.g., the change in the definition of "witness" to render such persons subject to the Commission's rigorous procedures in any type of inquisitional activity desired by the Commission (N.J.S.A. 32:23-85); the new immunity provisions (N.J.S.A. 32:23-86 (5)); and the sweeping new penalty provisions (N.J.S.A. 32:23-88, 89, 90).

The expansive process of which we speak, then, in connection with this legislation, is one that "grows by what it feeds on," and, inevitably, leads ever on to "increase of appetite"—scarcely a process that invites encouragement at the cost of that federal power which fuels the beneficient social machinery of the L.M.R.A.

Nor, forsooth, is the Waterfront Commission itself excluded from opportunity for prompt and effective succour by that same federal power in any necessary and proper case where the Commission's seemingly absolutist aspirations to fight "crime" may have to adjust to the pre-emptive jurisdiction of the N.L.R.B. The Compact expressly authorizes the Commission to advise and consult plenarily with "public officials and agencies * * * upon all matters which the Commission may desire" (N.J.S.A. 32: 23-10(12)). And even apart from such express authority, in the same way as may, e.g., municipal bodies,* rail roads,** and public utilities,*** so the Commission too, in aid of waterfront employers desiring the Commission's protection, may (no reason to the contrary appearing) invoke in appropriate cases the pre-emptive procedures of the L.M.R.A.; or, of course, such employers may themselves directly invoke those procedures.

Also not to be lost sight of, in the entire perspective raised by the broadside impact of the decisions below, are the express provisions of the Compact reserving the various conventional rights of union labor, including the right to strike (N.J.S.A. 32:23-68, 69), provisions for which little effective scope remains, under the decisions below, whenever the Commission chooses to invoke the virtually untrammelled right, under that decision, to cry "crime".

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* Cf. *Plumber's Local 298* v. *County of Door*, 359 U.S. 354.

** Cf. *Teamsters Local 25* v. *N.Y.N.H. & H.R.R. Co.*, 350 U.S. 155.

*** Cf. *Street, Electric R'way & Motor Coach Employees, etc.* v. *W.E.R.B.*, 340 U.S. 383.

The question here presented, as to the constitutionality of the Compact as construed and applied in the decisions below, is substantial, then, in the most weighty degree. The question is not governed by the *DeVeau* case, as above shown, for here there is not brought into play, either factually or analytically, the direct crime-prevention features which were decisive in *DeVeau;* here, rather, the whole realistic brunt of the state police power is upon a traditional type of labor-dispute situation which is not shown by even remotely adequate record proofs to partake of a "crime" element. Moreover, the question appears to be one of first instance, in this Court (*DeVeau* being inapposite, as seen).

POINT VI

Petitioners did not waive and they were not estopped from asserting their privilege against self-incrimination.

The respondent Waterfront Commission argues (Br. in Opp. pp. 8 *et seq.*) that "this is a singularly inappropriate case in which to consider a claim of federal incrimination upon a grant of state immunity because here that issue is seriously complicated by questions of waiver, estoppel and reasonableness".

(The issue of "reasonableness", i.e., whether petitioners had reason to fear federal incrimination, has been treated in our Point I, *supra.*)

The Court below rejected the respondent Commission's contentions that the petitioners had waived the privilege against self-incrimination or were estopped in that regard. The respondent Commission in its brief in opposition herein (pp. 9, 11) tries to minimize the significance of this ruling by the Supreme Court of New Jersey. The actual language of the Court below on this point was (R. 222):

> "* * * The Commission recognized the defendants' right to assert the privilege at its hearing of October 3, 1961, and the trial court on October 4, 1961 also recognized their right when it purged them of their original contempt. Moreover, at its hearing on October 27, 1961, the Commission clearly recognized the defendants' right to assert the privilege when it granted them immunity against prosecution. Finally, the contentions of waiver and estoppel were never raised by the Commission in the court below and therefore it may not raise them for the first time in this court."*

The above rejection, by the Court below, of the Commission's arguments as to waiver and estoppel occurred in the face of the intensest sort of effort by the Commission in that Court to prevail on those issues. At p. 55 of the Commission's brief in the Court below the Commission went so far as to make the following serious accusation against the within petitioners Murphy and Moody:

> "* * * clearly, defendants do not feel bound by any statement they may have made in any other Court or at any other stage of the Commission's contempt proceedings."

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* And see R. 39, where the Commission stated that it recognized Petitioners' right to assert the privilege "notwithstanding [according to the Commission] that it was probably waived".

Before this Court the Commission levels a similar accusation, stating (Br. in Opp. p. 8):

> "As noted, in their original appearances before the Commission in this investigation, petitioners specifically stated that they were not claiming the privilege gainst self-incrimination. Rather, they contended in the first contempt proceedings against them not only that their conduct was innocent and lawful but that their conduct was actually protected by federal labor legislation. Then, after the court below (the Supreme Court of New Jersey) affirmed the original civil contempt judgments and this Court denied review, petitioners, in a cynical *volte face*, proceeded to claim the privilege against the self-incrimination."

We shall now show that while the respondent Commission thus accuses the petitioners Murphy and Moody in effect of resorting to an unscrupulously opportunistic litigation strategy, it is actually the Commission itself that is guilty of exactly that sort of strategy in its contentions of "waiver" and "estoppel".

Whereas the Commission accuses Murphy and Moody of supposedly improper alleged changes of position in their refusal to testify (*i.e.* that they improperly changed from the ground of N.L.R.B. preemption or lack-of-jurisdiction in the prior contempt case to the self-incrimination ground in the second contempt case), what the Commission itself has done is that it has switched from (1) the ground that it possessed jurisdiction because the work stoppage was not a labor dispute but a *criminal* enterprise within the Commission's jurisdiction over waterfront crime, to (2) the ground that Murphy and Moody are now insincere in claiming that they believe the Commission meant what it said when it spoke of waterfront crime as being the essence of the prior stage of this case.

In other words, when the Commission wanted to win in the courts the first round of this controversy arising from the original May 1960 interrogation of Murphy and Moody, the Commission was all hot and earnest over how crucial a "crime" case this ~~is~~—because "crime" emphasis was necessary to win in the courts against Murphy's and Moody's N.L.R.B. jurisdiction argument. But now, in the instant second round of the controversy, arising from the purported immunity-conferrals of October 1961, where in order to win it becomes necessary for the Commission to pooh-pooh the "crime" phase so as to discredit Murphy's and Moody's fear of federal incrimination, the Commission strives to convince the courts that Murphy and Moody are engaging in "a cynical *volte face*" when they accept the Commission's own former trumpetings of the waterfront crime issue.

At the very first hearing before the Commission, in May, 1960, before any contempt proceedings had been brought, the Commission spoke exclusively of a "work stoppage", expressly stated that it did not know whether there was "anything wrong", and expressed its ignorance as to whether any "crime" element was involved. *E.g.*, DD34a-35a*

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* "DD a" refers to the printed "Appendix to Brief for Appellants" in the Superior Court of New Jersey, Appellate Division, which served also as such "Appendix" in the Supreme Court of New Jersey in the appeal from the first contempt judgment—which culminated in the dismissal by this Court of the prior appeal to this Court (368 U.S. 32). Nine extra copies of the latter Appendix were filed with our Jurisdictional Statement in this Court in the aforesaid prior appeal.

Is it surprising that, in those circumstances, the witnesses Murphy and Moody put their entire thrust on the N.L.R.B. jurisdiction issue and refrained from incurring the odium of pleading the privilege against self incrimination? Then, within literally hours after those initial events in May, 1960, the Commission was in court with elaborately prepared papers to hold the witnesses for contempt on the ground that the Commission's *crime-preventive* powers were at stake (DD1a to 12a). And then, throughout the ensuing stages of the prior contempt litigation, the Commission played this "crime" theme to the hilt. See the Commission's printed Brief and Appendix in the Court below in the prior appeal (Docket No. A-790-59), pp. 2-14, especially pp. 13-14. See, also, the Commission's "Motion To Dismiss Appeal" in this Court, October Term 1961, No. 362, pp. 4, 8-9. See, also, the opinions of Judge JOSEPH L. SMITH and of the Supreme Court of New Jersey in the prior proceeding, printed in full in the Appendix to our Petition for Certiorari in this Court in the instant proceeding (the former opinion of the Court below, again, is reported at 35 N. J. 62); both of those opinions are replete with the "crime" theme that the Commission had so strenuously urged upon those Courts.

Let us examine a little further into the consequences of these gyrations by the Commission. Suppose it is true that the Commission now sincerely believes that Murphy and Moody "waived" the privilege or are "estopped" from asserting it as of the time of the hearings in October, 1961. Why, then, did not the Commission then and there (in October 1961) move for contempt on such grounds of waiver and estoppel; why did the Commission instead "process"

Murphy and Moody for enmeshment in the "immunity" net; and why did the Commission defer its second contempt effort until it had first closed this net around the victims? If the Commission had taken the proper course (proper, that is, as judged by the Commission's own present claimed sincere professions to this Court on the issues of waiver and estoppel), *i.e.*, the course of moving for contempt in October 1961 on the grounds of waiver and estoppel alone and without the imported addition of "immunity", the petitioners would at least have had explicit apprisal *for trial purposes* that they were thus facing contentions of waiver and estoppel.

This opportunism in the Commission's tactics serves to accentuate more starkly perhaps than anything else in the case an important area of due process aggrievement which we assert in this case, namely, the utter inadequacy of the so-called "trial" for contempt. For what we now see is not only that that "trial" was constitutionally nugatory for all of the reasons asserted earlier in this brief, but that it was additionally defective because it did not even pass at all ("trial"-wise or otherwise) upon the issues of waiver and estoppel which the Commission now tenders to this Court as the very head and front of the Commission's stand in this certiorai proceeding.

Of course, the real factors which have impelled the Commission to go through all of these twistings and turnings include not only the factor of the Commission's sheer desire to win at any price, but they include also the stubborn truth that the Trial Court itself, on October 4, 1961, formally adjudged that Murphy and Moody were entitled to plead the privilege against self incrimination and that their having so pleaded had the effect of purging them of the original contempt (R. 44).

Were the situation not so aggrieving, it would be simply preposterous. A supposedly responsible Governmental body, enjoying extraordinary powers as the official trustee of two state sovereignties with the formal blessing of the Congress of the entire country, accuses citizens of repudiating an alleged "waiver" and "estoppel" when this same body itself expressly and repeatedly waived those supposed "waivers" and estopped itself from invoking those supposed estoppels.

Apart from the general considerations above suggested, the Commission's stand on the supposed issues of waiver and estoppel is legally unsound on the record facts of this case in any event.

This Court has declared that a witness compelled to testify has no occasion to invoke the privilege until testimony sought to be elicited will in fact tend to incriminate him. *Brown* v. *United States*, 356 U. S. 148. As seen, there was no occasion for Murphy and Moody to plead self incrimination in May, 1960. But at the second interrogation (October, 1961), the Commission's "crime" theme had come to occupy the forefront of the entire picture.

We have above referred to the fact that after the petitioners invoked the privilege on October 3, 1961 before the Commission, the Trial Judge adjudged that the defendants had purged themselves of the prior contempt judgment. The Trial Judge was at pains to make it explicit and emphatic that this adjudication of purgation marked an absolute closing off of the entire prior contempt proceeding, and that the Commission's announcement (on October 4, 1961) that it contemplated "immunity" proceedings would give rise to an entirely separate and distinct proceeding (R. 45):

> "The Court: The Court has heard the argument on the question now presented to the Court as to whether or not these defendants have purged themselves of the contempt on which they have previously been found guilty.
>
> This Court is satisfied that they have purged themselves of that contempt. They have obeyed the subpoena, appeared for examination, they have been examined by the Commission, and the record of the transcript of the testimony, as read to this Court, which is a part of this record, indicates that their refusal to answer was recognized as a proper ground and legal basis for their so refusing to answer those particular questions, as the record then stood, namely, on the basis of their constitutional right that it might tend to incriminate them. The Examiner so states many, many times in the record that has been presented to me. The fine has been paid."
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> * * * * *
>
> "* * * What is done then under this statute of immunity is *entirely separate and apart from what* this Court and the appellate courts have already passed upon. It is not a part of this proceeding * * *." [Italics added]

The separateness of the proceeding out of which the present contempt case arises—the immunity proceeding which came later in the month of October, 1961—is further conclusively shown by the fact that the prior contempt case was (at least ostensibly) purely civil, whereas the instant contempt case was (at least ostensibly) both civil and criminal, and was of course, again, based upon a new and separate interrogation of the petitioners, an interrogation which moreover imported the wholly new and additional element of an immunity-conferral. (These last mentioned facts, as earlier noted, did not prevent the Commission's attorney from trying to make the Trial Court believe that there was no essential legal difference between the two respective contempt proceedings.)

It is elementary that, where such separate proceedings are involved, a witness in the subsequent proceeding may not be held to have waived his privilege by any of his testimony in the prior proceedings. *United States* v. *Miranti*, 253 F. 2d 135, 139 (C A. 2 1958), collecting the numerous authorities for this proposition.

It is submitted that the Commission's belated reliance on "waiver" and "estoppel" is not only unsound in law but reveals the fatal weakness of the Commission's entire case before this Court—*i.e.*, if the Commission felt itself secure on the true primary issues herein—*viz.*, the issues of adequate trial and ineffectual "immunity" for failure to cover federal incrimination—the Commission would not tender as its prime issues such frivolous contentions as those of waiver and estoppel on the present record.

Indeed, if the Commission deems the petitioners' use of the privilege nugatory because "waived" and "estopped", the very conferral of immunity to overbear the privilege loses all foundation in the record, and there was no jurisdiction in the Trial Court to entertain the instant contempt motions at all.

Mention should be made also of the respondent Commission's argument at pp. 10-11 of its Brief in Opposition to the effect that petitioners are "estopped" (as distinct from the "waiver" issue itself) by statements made in one of petitioners' State Court briefs and in our Jurisdictional Statement in this Court in the prior contempt case. *First*, as to the statement in the State Court brief just mentioned, aside from the fact that the Commission gives the impression that said brief was filed in the instant second contempt proceeding whereas in fact that brief was filed in the first contempt proceeding, the statement from that brief to which the Commission points (Br. in Opp. p. 10) deals only with the question of violence immediately attendant upon the work stoppage itself, not with any question of crime in the *purpose* of the work stoppage, *i.e.*, not with any question of a criminal purpose to get rid of a port security officer so that thefts could be perpetrated. *Second*, as regards the passage in our prior Jurisdictional Statement to which the Commission points (Br. in Opp. p. 11), all we were there saying was that (as we believe has been amply demonstrated to be true) the record in the original interrogation of Murphy and Moody did not establish that the Commission's claim of jurisdiction rested upon "crime" elements in the situation as distinct from sheer "labor dispute" elements.

And, once again, the Commission's over-and-over repeated idea in its Brief in Opposition (see especially pp. 8-11) that petitioners' emphasis upon the N.L.R.B. preemption issue rather than on self-incrimination in the first interrogation and in the first contempt proceeding precluded petitioners from invoking the privilege against self-incrimination at the subsequent interrogations and in the instant second contempt proceeding, completely loses sight of the fact that two separate and distinct proceedings, substantially separated from each other in time, are here involved.

Finally, we invoke the classic rule that waiver of a constitutional right is not to be lightly presumed. *Johnson* v. *Zerbst*, 304 U.S. 458; *Amos* v. *United States*, 255 U.S. 313.

CONCLUSION

It is respectfully submitted that the judgment under review should be reversed.

Respectfully submitted,

Harold Krieger
Attorney for Petitioners

[Appendices follow]

APPENDIX A

Statutes and Rules of Court

N.J.S.A. 32:23-6:

"'Port watchman' shall include any watchman, gateman, roundsman, detective, guard, guardian or protector of property employed by the operator of any pier or other waterfront terminal or by a carrier of freight by water to perform services in such capacity on any pier or other water front terminal."

N.J.S.A. 32:23-6:

"'Compact' shall mean this compact and rules or regulations lawfully promulgated thereunder."

N.J.S.A. 32:23-10 (8, 11):

"In addition to the powers and duties elsewhere prescribed in this compact, the commission shall have the power:

* * * * *

"8. By its members and its properly designated officers, agents and employees, to administer oaths and issue subpoenas throughout both states to compel the attendance of witnesses and the giving of testimony and the production of other evidence;

* * * * *

"11. To make investigations, collect and compile information concerning waterfront practices generally within the port of New York district and upon all matters relating to the accomplishment of the objective of this compact;"

N.J.S.A. 32:23-10(12):

"* * * the commission shall have power"

* * * * *

"12. To advise and consult with representatives of labor and industry and with public officials and agencies concerned with the effectuation of the purposes of this compact, upon all matters which the commission may desire, including but not limited to the form and substance of rules and regulations, the administration of the compact, maintenance of the longshoremen's register, and issuance and revocation of licenses."

N.J.S.A. 32:23-62:

"The failure of any witness, when duly subpoenaed to attend, give testimony or produce other evidence, whether or not at a hearing, shall be punishable by the superior court in New Jersey and the supreme court in New York in the same manner as said failure is punishable by such court in a case herein pending."

.J.S.A. 32:23-63:

"Any person who, having been sworn or affirmed as a witness in any such hearing, shall wilfully give false testimony or who shall wilfully make or file any false or fraudulent report or statement required by this compact to be made or filed under oath, shall be guilty of a misdemeanor, punishable by a fine of not more than one thousand dollars or imprisonment for not more than one year or both."

N.J.S.A. 32:23-68, 69:

"This compact is not designed and shall not be construed to limit in any way any rights granted or derived from any other statute or any rule of law for employees to organize in labor organizations, to bargain collectively and to act in any other way individualy, collectively, and through labor organizations or other representatives of their own choosing. Without limiting the generality of the foregoing, nothing contained in this compact shall be construed to limit in any way the right of employees to strike."

"This compact is not designed and shall not be construed to limit in any way any rights of longshoremen, hiring agents, pier superintendents or port watchmen or their employers to bargain collectively and agree upon any method for the selection of such employees by way of seniority, experience, regular gangs or otherwise, provided that such employees shall be licensed or registered hereunder and such longshoremen and port watchmen shall be hired only through the employment information centers established hereunder and that all other provisions of this compact be observed."

N.J.S.A. 32:23-85(4):

" 'Witness' shall mean any person whose testimony is desired in any investigation, interview or other proceeding conducted by the commission pursuant to the provisions of this act."

N.J.S.A. 32:23-85(7):

" 'Compact' shall also include any amendments or supplements to the waterfront commission compact to implement the purposes thereof adopted by the action of the legislature of either the state of New York or the State of New Jersey concurred in by the legislature of the other." [The foregoing provision is not part of the compact as consented to by Congress in 1953]

N.J.S.A. 32:23-86(5):

"In addition to the powers and duties elsewhere prescribed in this act, the commission shall have the following powers:

* * * * *

"To confer immunity, in the following manner: in any investigation, interview or other proceeding conducted under oath by the commission or any duly authorized officer, employee or agent thereof, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and nothwithstanding such refusal, an order is made upon twenty-four hours' prior written notice to the appropriate attorney general of the state of New York or the state of New Jersey, and to the appropriate district attorney or prosecutor having an official interest therein, by the unanimous vote of both members of the commission or their designees appointed pursuant to the provisions of section three of article III of this act, that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this subdivision, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein.

"'Immunity' as used in this subdivision means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by the unanimous vote of both members of the commission or their designees appointed pursuant to the provisions of section three of article III of this act, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt.

" 'Immunity' shall not be conferred upon any person except in accordance with the provisions of this subdivision. If, after compliance with the provisions of this subdivision, a person is ordered to answer a question or produce evidence of any other kind and complies with such order, and it is thereafter determined that the appropriate attorney general or district attorney or prosecutor having an official interest therein was not notified, such failure or neglect shall not deprive such person of any immunity otherwise properly conferred upon him." [32:23-86].

N.J.S.A. 32:23-88:

"Any person who, having been duly sworn or affirmed as a witness in any investigation, interview or other proceeding conducted by the commission pursuant to the provisions of this act, shall wilfully give false testimony shall be guilty of a misdemeanor punishable by a fine of not more than one thousand dollars or imprisonment for not more than one year or both." [The foregoing provision is not part of the compact as consented to by Congress in 1953]

N.J.S.A. 32:23-89:

"The commission may maintain a civil action on behalf of the state against any person who violates or attempts or conspires to violate any provision of the compact or who fails, omits or neglects to obey, observe or comply with any order or direction of the commission, to recover a judgment for a money penalty not exceeding five hundred dollars for each and every offense. Every violation of any such provision, order or direction shall be a separate and distinct offense, and, in case of a continuing violation, every day's continuance shall be and be deemed to be separate and distinct offense. * * *" [The foregoing provision is not part of the Compact as consented to by Congress in 1953]

N.J.S.A. 32:23-90:

"The commission may maintain a civil action against any person to compel compliance with any of the provisions of the compact, or to prevent violations, attempts or conspiracies to violate any such provisions, or interference, attempts or conspiracies to interfere with or impede the enforcement of any such provisions or the exercise or performance of any power or duty thereunder, either by mandamus, injunction or action or proceeding in lieu of prerogative writ." [The foregoing provision is not part of the Compact as consented to by Congress in 1953]

[N.J.] *R.R.* 4:46-5(c):

"Where a statute provides that failure of a person to obey a subpoena or order of a public officer or

> administrative agency or a receiver, to testify, to answer a proper question, or to produce books, papers, documents or tangible things, or that misconduct on the part of a person attending a hearing, shall be punishable by the court in the same manner as like failure or misconduct is punishable in a case pending in the court, the matter shall be brought before the court by motion supported by affidavit, stating the circumstances. Upon the motion the court may issue an order to show cause, returnable in not less than 2 nor more than 10 days, requiring the person to show cause before the court why he should not be punished; or the court may issue an attachment. If the court determines that the failure or misconduct above mentioned was without justification, it may punish him as for a contempt of court."

[N.J.] *R.R.* 4:87-1: Contempt in the Presence of the Court:

> "A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record."

[N.J.] *R.R.* 4:87-2: Proceedings Upon Notice:

> "Every other contempt, whether of a criminal or civil nature, shall be prosecuted on notice, and if it occurs in an action, it shall be prosecuted in the action in which it occurs. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense and shall state the essential facts constituting the contempt

charged. Whether the contempt charged is criminal or civil in nature, the notice may be given by an order to show cause; and the person charged with contempt may, not later than 1 day before the return of such an order, or within such time as the court may allow, serve an answer or an answering affidavit, or he may plead orally at the hearing. In any cause in which the court determines that the contempt charged may be criminal in nature—

(a) The notice may be given orally by the judge in open court in the presence of the person charged with contempt or by an order of arrest, or, as stated, by an order to show cause.

(b) If the person charged with contempt gives to the clerk of the court a good and sufficient bond for his appearance at the hearing, approved by any one of the judges of the Appellate Division, he shall be admitted to bail pending the hearing.

(c) The court may designate as prosecutor of the proceeding, the Attorney General, the county prosecutor or any other attorney of this State.

(d) If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the consent of the person charged with contempt.

(e) If the substance of the charge is a violation of an order or judgment of the court, the judge who made the order or judgment is likewise disqualified, except that proceedings charging contempt of an order issued in aid of judgment or execution may be heard by the judge who made such order.

The procedure by attachment may be invoked in the case of witnesses or persons not parties to the action, but it is superseded in the case of parties. Interrogatories are not required.

Note: Effective September 9, 1953; paragraph (e) amended June 27, 1955 to be effective September 7, 1955. Formerly Rule 3:80-2, amended November 10, 1949; January 1, 1952."

APPENDIX B

Defendants' Memorandum in Support of Motion for Bill of Particulars and Right to Submit Interrogatories

[Filed in Superior Court of New Jersey]

The Commission's motions for contempt herein pray for punishment as for both civil and criminal contempts.

The New Jersey Rules of Practice for civil and criminal contempts respectively, while being closely similar as to the two classes of contempts, are to be found separately set forth in parts 3 and 4 of the Revised Rules. See R.R. 3:8 (criminal contempt) and R.R. 4:87 (contempt—referring to both civil and criminal contempts).

The Rules of Criminal Practice in Part 3 of the Revised Rules expressly provide, of course, for bills of particulars. R.R.3:4-6. On the face of the latter rule, and in view of the fact that said rule is expressly contained in the same "part" of the rules as is R.R. 3:8 (criminal contempt) it seems indubitable that a defendant in a proceeding for criminal contempt is entitled to move for a bill of particulars under R.R. 3:4-6. The latter rule refers not only to the "indictment" but also to the "accusation". The "accusation" in our case, consists of the Commission's motion papers. Within the meaning of R.R. 3:4-6 this "accusation" "is not sufficiently specific to enable the defendant to prepare his defense". Our reasons for contending that the "accusation" is thus inadequate are set forth below.

Under the closely comparable federal practice, it is thoroughly settled that a defendant in a criminal contempt proceeding is entitled to move for a bill of particulars.

Appendix B—Defendants' Memorandum in Support of Motion for Bill of Particulars and Right to Submit Interrogatories

The leading case is *United States* v. *Balaban*, 26 F. Supp. 491, 498 (N.D. Ill. 1939), where the Court said:

> ". . . the analogy between a proceeding in criminal contempt and an indictment for a criminal offense is so compelling as to leave no doubt that, in a proper case, a bill of particulars may be exacted . . ."

Accord: *United States* v. *French*, 9 F. Supp. 30-31 (W.D. Mich. 1934); *Fox* v. *United States*, 77 F. 2d 210-211 (C.C.A. 4 1935); *Conley* v. *United States*, 59 F. 2d 929, 935 (C.C.A. 8 1932).

As regards the civil aspect of the Commission's motions for contempt herein, we maintain that we are entitled to pretrial discovery by all appropriate avenues made available under part 4 of the Revised Rules of Civil Practice in the Superior Court. As above mentioned, the contempt proceedings herein insofar as they arise on the civil side must be conducted pursuant to R.R. 4:87; indeed, it would appear that the alleged contempts herein insofar as they arise on the criminal side also bring into play R.R. 4:87, inasmuch as the latter rule deals with both civil and criminal contempts. No reason is apparent to us, and we do not see how any could be suggested, that would justify denying to a defendant in a civil (or a civil and criminal contempt proceeding) under R.R. 4:87 the rights of pretrial discovery which are provided generally for all proceedings under part 4 of the Revised Rules. Specifically, in this case, the pretrial discovery which we seek on the civil side is by way of interrogatories, although we reserve also the right to proceed to take depositions and to serve request for admissions. The

Court will note that the substantive portions of our motion for bill of particulars are identical with our proposed interrogatories. We have done this, not in order to burden the Commission unduly, but to secure our position on both the civil and criminal sides of the practice requirements which may be applicable to this proceeding. A single set of proper answers to either the bill of particulars or to the interrogatories will suffice to cover both of those discovery requests.

Turning now to the question of why we deem ourselves entitled to such discovery under the particular circumstances of this case:—The New Jersey Rules of Evidence adopted in 1960 provide (N.J.S.A. 2A:84A-32, Rule 40, para. (2)) that:

> "(2) If a witness refuses to answer a question, under color of a privilege claimed pursuant to Rules 23 through 38, after the judge has ordered the witness to answer, and a contempt proceeding is brought against the witness, the court hearing the same shall order it dismissed if it appears that the order directing the witness to answer was erroneous."

The defendants herein contend that the Commission's orders of immunity directing them to answer were "erroneous" within the meaning of the above quoted statute and rule. Specifically, those immunity orders were erroneous for the several reasons argued in our main and supplemental briefs addressed to the merits of the contempt motions, and summarized in our several separate defenses set forth in our answer to those motions. For example, if we are correct in our argument that the Commission pressured and maneuvered the defendants into an alleged contempt by conducting the interrogation and the proceedings for conferral of immunity in a manner contrary to due process or in violation of statute, then the defendants are not in contempt because the orders directing them to answer were erroneous. In nearly every facet of this case a full and fair determination as to the validity or erroneousness of the orders to testify entails a substantial further jurisdictional inquiry of fact; wherefore, there is entailed also the need to afford the defendants adequate opportunities for pretrial discovery in aid of such jurisdictional inquiry into fact. Thus, if we are correct that we were denied due process of law by being maneuvered into invoking the privilege against self-incrimination and into incurring the disadvantages of immunity, the due process violation inhering in the fact that we were not given a rational opportunity to make our choice on the basis of a really meaningful apprisal of just what accusatory facts the Commission claimed to have and who its witnesses are, then it would follow that we are now entitled to discovery for those purposes. Similarly, we are entitled to discovery on the issues of the Commission's purported delegation of power to administrative subordinates; and as to the issues of notification to the Attorney Generals of the states of New York and New Jersey. Above all, we are entitled to such discovery on the issue of whether the subject matter of the Commission's questioning of the defendant-witnesses came within the Commission's jurisdiction at all, or was within the area of federal preemption under the Federal Labor Management Relations Act.

CONCLUSION

It is respectfully submitted that either the defendants' motion for bill of particulars should be granted or the defendants' interrogatories should be answered, or both such processes of discovery should be permitted.

Respectfully submitted,

Kreindler & Chodash

By Harold Kreindler

Robert Wall

Attorneys for Defendants

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Supreme Court of the United States

OCTOBER TERM, 1963

No. 138

WILLIAM MURPHY and JOHN MOODY, SR.,
Petitioners,

vs.

THE WATERFRONT COMMISSION OF NEW YORK HARBOR,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

RESPONDENT'S BRIEF

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Dated: February, 1964

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INDEX

PAGE

Statement 1

The First Contempt Proceedings 1

Petitioners' Continued Refusal to Testify After Affirmance of the First Civil Contempt Judgments 4

The Second (and Instant) Contempt Proceeding 6

Summary of Argument 9

ARGUMENT:

POINT I—Petitioners cannot validly claim the privilege against federal incrimination because they waived the privilege, because they are estopped from asserting the privilege, and because there is no reasonable basis for their asserted fear of federal incrimination 14

A. The questions of waiver, estoppel, and reasonableness are federal questions properly before, and cognizable by, this Court 14

B. Since petitioners in their original appearance before the Commission specifically asserted that they were not refusing to testify upon the ground of self-incrimination, petitioners have waived the privilege against federal incrimination 16

C. Since petitioners contended in the first contempt proceeding that the Commission's investigation constituted an unlawful interference with conduct that was not criminal and that was either affirmatively protected or exclusively governed by federal labor legislation, petitioners are estopped from taking the inconsistent position in this contempt proceeding that their testimony may implicate them in violations of federal criminal law 30

PAGE

D. Petitioners have no reasonable basis for their asserted fear of federal incrimination 34

POINT II—Petitioners did not have a constitutional right to refuse to testify upon the ground that the Commission's grant of immunity from prosecution extended only to state, and not to federal, crimes 39

A. The decision by this Court in *Malloy* v. *Hogan* (No. 110 this Term) concerning the applicability of the Fifth Amendment to the states does not control the instant case ... 39

B. The Court should adhere in this case to its previous decisions that a state witness who has been granted immunity from state prosecution cannot refuse to testify upon the ground of federal incrimination 41

C. If the Court should be of the view that petitioners must be protected against federal incrimination before their testimony may be compelled, then the Court should overrule *Feldman* which permits the use of state immunity testimony in a federal prosecution 44

POINT III—Petitioners' other contentions respecting the within civil contempt judgments (that they were entitled to jury trial; that they were entitled to a trial on the issue of their good faith; that they were entitled to know what information was contained in the Commission's files; and that they were denied the equal protection of the laws) are without merit 47

Conclusion 50

TABLE OF CASES

PAGE

Allen Bradley Co. v. Local 3 Electrical Workers, 325 U. S. 797 37

Application of Waterfront Commission, 35 N. J. 62 (1961), appeal dism'd and cert. den., 368 U. S. 32 4

Brown v. Walker, 161 U. S. 591 40

Cleary v. Bolger, 371 U. S. 392 39

Cohen v. Beneficial Industrial Loan Corp., 337 U. S. 541 50

Elkins v. United States, 364 U. S. 206 47

Emspak v. United States, 349 U. S. 190 25

Fahey v. Connecticut, 84 Sup. Ct. 229 16

Feldman v. United States, 322 U. S. 487 .... 13, 43, 45

Green v. United States, 356 U. S. 165 47

Hale v. Henkel, 201 U. S. 43 40

Hannah v. Larche, 363 U. S. 420 49

Hebert v. State of Louisiana, 272 U. S. 312 43

Hoffman v. United States, 314 U. S. 479 .... 34, 36

In re Boiardo, 34 N. J. 599 (1961) 7, 35

In re Dolowich, 246 App. Div. 209, 285 N. Y. Supp. 483 (1st Dept. 1936) 38

Hutcheson v. United States, 369 U. S. 599 40

Jack v. Kansas, 199 U. S. 372 40

Ker v. California, 374 U. S. 23 16

Knapp v. Schweitzer, 357 U. S. 371 .... 40, 41, 46

Langnes v. Green, 282 U. S. 531 15

PAGE

Mapp v. Ohio, 367 U. S. 643 43

Marshall v. Pletz, 317 U. S. 383 16

McComb v. Jacksonville Paper Co., 336 U. S. 187 .. 48

Mills v. Louisiana, 360 U. S. 230 40

Moore v. Backus, 78 F. 2d 571 (7th Cir. 1935) 45

National Association for the Advancement of Colored People v. Alabama, 360 U. S. 240 33

Scarano v. Central R. of New Jersey, 203 F. 2d 510 (3rd Cir. 1953) 33

Sinclair v. United States, 279 U. S. 263 48

Sola Electric Co. v. Jefferson Electric Co., 317 U. S. 173 16

State v. Decola, 33 N. J. 335 (1960) 28

State v. Fary, 19 N. J. 431 (1955) 28

Twining v. New Jersey, 211 U. S. 78 40

United States v. Amer. Ry. Exp. Co., 265 U. S. 425 15

United States v. Bonanno, 178 F. Supp. 62 (S.D.N.Y. 1959) 43

United States v. Maranti, 253 F. 2d 135 (2nd Cir. 1958) 27

United States v. Murdock, 284 U. S. 141 40

United States v. Pink, 315 U. S. 203 16

United States v. St. Pierre, 132 F. 2d 837 (2nd Cir. 1942), appeal dism'd 319 U. S. 41 27

Weir v. Chicago Plastering Institute, 272 F. 2d 883 (7th Cir. 1959) 37

STATUTES

	PAGE
New Jersey Statutes Annotated:	
32:23-27	2
32:23-39	2
32:23-86	5
32:23-105	2
New York's McKinney's Unconsolidated Laws:	
9827	2
9839	2
9906	5
9918	2
New York Penal Law, Section 530	39
18 U.S.C. § 1951	36
29 U.S.C. § 159(b) (3)	37

MISCELLANEOUS

Beck, *Estoppel Against Inconsistent Positions In Judical Proceedings* 9 Brooklyn Law Review 245 (1940)	33
8 Wigmore, Evidence (1961 ed. McNaughton Revision)	
pp. 492-3	42
pp. 496-7	42
pp. 495-507, footnote 11	42

Supreme Court of the United States

OCTOBER TERM, 1963

No. 138

William Murphy and John Moody, Sr.,
Petitioners,
vs.
The Waterfront Commission of New York Harbor,
Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

RESPONDENT'S BRIEF

Statement

The First Contempt Proceedings

The American Export Lines, Inc. which leases and operates waterfront piers and a terminal in Hoboken, New Jersey, employed one James H. Markley to be its Chief Security Officer in the port of New York, including Hoboken. The employment of James H. Markley commenced May 16, 1960. Prior to the commencement of his employment with American Export Lines, James H. Markley was an investigator for the Waterfront Commission and his principal assignment for the Commission had been to cover said piers and terminal of American Export Lines, Inc., in Hoboken (R. 5).*

On Monday, May 16, 1960, Markley, pursuant to his duties, walked onto the piers of the American Export Lines in Hoboken. Thereupon, the longshoremen and checkers employed by the American Export Lines in Hoboken walked off the piers. This work stoppage, except for the morning of Tuesday, May 17, 1960, continued through Friday, May 20, 1960. The work stoppage was in effect during the times that Markley, pursuant to his duties, was on the piers of the American Export Lines in Hoboken. Since May 20, 1960, when the work stoppage ended, and as of November 1, 1961 (the date of the Commission's contempt motions herein) Markley had not set foot on the piers of American Export Lines in Hoboken (R. 6).

Under the Waterfront Commission Act, the longshoremen and checkers who participated in this work stoppage are required to be and are registered by the Waterfront Commission (New York McKinney's Unconsolidated Laws, 9827, 9918; New Jersey Statutes Annotated, 32:23-27, 32:23-105). Also, under the Waterfront Commission Act, James H. Markley, as Chief Security Officer of American Export Lines, must be and is licensed by the Commission as a port watchman (New York McKinney's Unconsolidated Laws, 9839; New Jersey Statutes Annotated, 32:23-39) (R. 6).

The Commission had information that the work stoppage in May, 1960 was a concerted effort to keep James H. Markley off the piers of the American Export Lines in Hoboken, New Jersey. Accordingly, in order to determine whether this work stoppage constituted an illegal coercion of an employer (the American Export Lines) to compel such employer to limit the functions of, or to discharge, a licensed port watchman (James H. Markley) and further to determine whether any persons registered or licensed by the Commission were participating in such illegal coercion, the Commission instituted the present investigation (R. 6).

---

* The Commission's verified motions to punish petitioners for contempt set forth the purpose of the Commission's investigation, i.e., the fact of the work stoppage and the information possessed by the Commission respecting such work stoppage (R. 3-13).

In connection with such investigation, subpoenas of the Commission were duly served on May 18, 1960, upon the petitioners, William Murphy, the business agent of Local 2 of the International Longshoremen's Association, representing longshoremen in Hoboken, New Jersey, and John Moody, Sr., the organizer for the ILA in the State of New Jersey. Both Murphy and Moody appeared at the offices of the Commission in response to these subpoenas on the afternoon of May 19, 1960 (R. 187, 200).

Moody, after giving his name and address, testified that he was a union official and refused to answer any other questions (R. 187-197). Murphy testified that he was a business agent of Local No. 2, and represented members of his local working at the American Export Piers in Hoboken (R. 205). He stated that he knew the pier did not work on Monday (May 16, 1960) and that it was common knowledge for the previous ten days that things were not normal at Piers A, B and C, Hoboken [American Export Lines Piers] (R. 205-207). Murphy then refused to answer whether or not these abnormal conditions were related to the appointment of Markley as Chief Security Officer and refused to answer any further questions (R. 207-211).

The reasons for this first refusal of petitioners to testify comprised the following grounds: (1) the work stoppage was a labor-management dispute or matter which the Commission had no statutory authority to investigate (Moody, R. 188-189; Murphy, R. 203-204); (2) the work stoppage was a matter over which the National Labor Relations

Board had exclusive jurisdiction (Murphy, R. 203-204); (3) the Commission had no right to investigate the work stoppage since civil litigation may have ensued as a result thereof (i.e., the American Export Lines had threatened to sue the ILA) (Moody, R. 189, 197; Murphy, R. 202-203, 208); and (4) the Commission's investigation sought to inquire into privileged communications between union and management or between union representatives (Moody, R. 191). Neither Moody nor Murphy asserted during their first appearance the privilege against self-incrimination, although both were specifically asked if that was one of the grounds for their refusal to testify (Moody, R. 195; Murphy, R. 210).

Thereupon, the Commission instituted contempt proceedings against petitioners in the Superior Court of New Jersey, Hudson County, which, by judgments dated June 20, 1960, adjudged petitioners guilty of civil contempt for their refusals to answer and ordered that they be incarcerated until they obeyed the Commission's subpoena by appearing and testifying. These civil contempt judgments provided for a stay of execution pending appeal upon the posting of bail in the amount of $500 (R. 175). Upon appeal by petitioners, the contempt judgments against petitioners were affirmed by the Supreme Court of New Jersey. *Application of Waterfront Commission of New York Harbor*, 35 N. J. 62 (1961). This Court dismissed petitioners' appeal to this Court and also denied certiorari (368 U. S. 32).

Petitioners' Continued Refusal to Testify After Affirmance of the First Civil Contempt Judgments

Petitioners appeared before the Superior Court of New Jersey, Hudson County, on October 3, 1961 pursuant to the mandate of the Supreme Court of New Jersey affirming the civil contempt judgments against petitioners. The Superior Court directed that petitioners appear at the offices of the Commission pursuant to the Commission's subpoenas (R. 8). Petitioners did appear at the offices of the Commission on October 3, 1961 as directed by the Superior Court (Murphy, R. 14; Moody, R. 31). However, except to give their names, addresses and occupations, petitioners again refused to answer all questions, this time upon a myriad of entirely new objections, including the privilege against self-incrimination (Murphy, R. 14-31; Moody, R. 31-43). All of these new and multifarious objections were overruled except the privilege against self-incrimination. The subpoenas were adjourned until October 10, 1961 in order to give the Commission an opportunity to determine whether to grant petitioners immunity from prosecution pursuant to the provisions of Section 5-b(5) of the Waterfront Commission Act (New York McKinney's Unconsolidated Laws 9906; New Jersey Statutes Annotated 32:23-86) and, if so, to afford the Commission an opportunity to give the notice required by Section 5-b(5) to the appropriate state law officials (Murphy, R. 26-31; Moody, R. 42-43).

On October 4, 1961, Murphy and Moody appeared again before the Superior Court for the purpose of determining whether they had purged themselves of their contempt. The Superior Court by oral decision rendered from the bench held that petitioners had purged themselves of their contempt, but further made it explicitly clear that the Commission's subpoenas herein still remained in force and effect and that petitioners were still required to appear at the offices of the Commission pursuant to the Commission's subpoenas on October 10, 1961 (R. 44-45). In accordance with such oral decision, the court below signed an order dated October 4, 1961 purging petitioners of their contempt but also providing that petitioners should appear on the adjourned return date pursuant to the Commission's subpoenas (R. 46-47).

On October 27, 1961 (the duly adjourned return date of the Commission's subpoenas) petitioners appeared at the offices of the Commission (Murphy, R. 47; Moody,

R. 72). Pursuant to the provisions of Section 5-b(5) of the Waterfront Commission Act, petitioners were duly granted immunity from prosecution and directed to testify by the Commissioners' designees, Mr. William P. Sirignano, the Commission's General Counsel, sitting for Commissioner David C. Thompson of New Jersey, and Mr. Myles J. Ambrose, the Commission's Executive Director, sitting for Commissioner Harold R. Tyler, Jr. of New York (Murphy, R. 47-72; Moody, R. 72-83). Notwithstanding such grant of immunity from prosecution, petitioners again refused to testify upon multifarious grounds (Murphy, R. 47-72; Moody R. 72-83). For the first time, petitioners indicated that they were relying upon *federal* incrimination as one of their grounds for not testifying, and the Commission thereupon specifically advised petitioners that the Commission's conferral of immunity did not extend to federal crimes (R. 57-58; 73) and that petitioners would be subject to contempt proceedings for their refusal to testify (Murphy, R. 71-72; Moody, R. 82). The Commission then instituted the second and instant contempt proceedings against petitioners to have them adjudged in both civil and criminal contempt for their refusal to testify (R. 1-13).

The Second (and Instant) Contempt Proceeding

The instant (and second) contempt proceedings against petitioners were heard before the Superior Court on November 21, and 22, 1961 (R. 98). At the same time, the Superior Court heard a motion by petitioners to quash the Commission's subpoenas upon the ground of numerous claimed illegalities by the Commission (R. 99-100, 165-167). Petitioners also moved for a bill of particulars and, apparently in the alternative, for interrogatories substantially identical to the bill of particulars (R. 93-96, 100). These discovery motions were exceedingly extensive and sought to compel the Commission in effect to open up for inspection its entire investigative files herein, including, for example, intra-office communications, as well as communications between the Commission and any United States officials and between the Commission and any state law officers (R. 93-96). Finally, petitioners demanded a jury trial in the event the Superior Court failed to deny the Commission's contempt motions as a matter of law (R. 97, 100).

At the contempt hearing before the Superior Court, petitioners' counsel contended, among other things, that the conferral of immunity from prosecution by the Commission was invalid because it did not extend to federal crimes and that there were many crimes as to which petitioners might incriminate themselves (R. 101-107). The Commission contended, among other things, that petitioners were playing fast and loose with the courts in that in the first contempt proceedings against them petitioners claimed that nothing more was involved than a labor-management dispute which the Commission did not have the power to investigate and now in order to justify their persistent refusal to testify, after the civil contempt judgments against them had been affirmed and after they had been granted immunity from prosecution, petitioners were claiming that all kinds of criminal activity were involved (R. 109-110). The Commission further contended in this connection that petitioners did not show a reasonable basis for apprehension of criminal involvement under federal law and that it was incumbent upon petitioners by the decision of the Supreme Court of New Jersey in *In re Boiardo,* 34 N. J. 599 (1961), to testify, themselves, under oath and thus under penalty of perjury, and to identify the area of federal criminal involvement sufficiently to show that their fear of federal incrimination was reasonable (R. 110). Counsel for petitioners contended that it clearly appeared from the record without testimony from petitioners that petitioners feared federal incrimination; however, counsel offered to put petitioners on the stand if there were any question about petitioners' fear of federal incrimination (R. 111-112). The

Superior Court ruled that petitioners could testify if they desired to do so (R. 117-118). Petitioners then voluntarily took the stand and enumerated the federal crimes as to which they allegedly feared incrimination (Murphy, R. 118-133; Moody, R. 133-140).

By oral decision, the Superior Court rejected petitioners' various legal objections and found that petitioners were guilty of both civil and criminal contempt (R. 143-165). The Superior Court also denied petitioners' various motions (i.e., the motion to quash, the motions for a bill of particulars and interrogatories, and the motion for a jury trial) (R. 165). The Superior Court entered judgments on December 4, 1961 which ordered that petitioners be incarcerated until they answer certain questions specified in the judgments and further fined petitioners $50 each and sentenced petitioners to thirty days in jail (Moody, R. 176-179; Murphy, R. 179-183). The judgments provided for a stay of execution pending appeal upon the posting of bail (R. 179, 183), which was in the amount of $500 (R. 175).

Upon appeal, the Supreme Court of New Jersey, by mandate dated March 4, 1963, affirmed the contempt judgments insofar as such judgments adjudged petitioners guilty of civil contempt and ordered petitioners incarcerated until they answered the specified questions and until they paid a fine of $50 each (R. 240-241). The Supreme Court of New Jersey reversed the contempt judgments with directions for a new trial insofar as such judgments adjudged petitioners guilty of criminal contempt and sentenced petitioners to thirty days in jail (R. 240-241). The ground for the reversal of the criminal contempts by the Supreme Court of New Jersey was that petitioners had made known their desire for an opportunity to introduce evidence on the question of their intent to commit a criminal contempt and that petitioners were exposed to criminal punishment without being afforded "the opportunity to present evidence in their defense, if any, and in extenuation of the offenses charged and in mitigation of the penalties to be imposed" (R. 240). By order dated May 20, 1963, the Supreme Court of New Jersey stayed enforcement of the civil contempts by recalling its mandate pending review by this Court.

Summary of Argument

I

Petitioners cannot validly claim the privilege against federal incrimination because they waived the privilege, because they are estopped from asserting the privilege, and because there is no reasonable basis for their asserted fear of federal incrimination.

A. These questions of waiver, estoppel, and reasonableness are federal questions properly before, and cognizable by, this Court. The decision by the court below (the Supreme Court of New Jersey) that the objections of waiver and estoppel are not available to the Commission because the Commission recognized petitioners' right to claim the privilege against self-incrimination and because the Commission did not assert these objections in the Superior Court (the court of first instance) is not conclusive upon this Court. (The court below did not decide the question of reasonableness.)

1. The record shows that the Commission never recognized a right in petitioners to claim *federal* incrimination and further that the Commission did, in fact, assert the objectons of waiver and estoppel in the Superior Court. In any event, the Commission, as a respondent herein, may urge any ground that appears in the record in support of the civil contempt judgments herein.

2. The questions of waiver, estoppel and reasonableness are federal questions cognizable by this Court because this Court will review or independently determine

all questions upon which a federal right is necessarily dependent.

B. 1. Petitioners, in their original appearance before the Commission in this investigation in May, 1960, stated that they were not claiming the privilege against self-incrimination. Further, petitioners specifically asserted throughout the entire round of litigation involving the first civil contempt judgments that they were not relying upon the privilege. Accordingly, petitioners have waived the privilege against self-incrimination in this investigation.

2. Although the Superior Court held that petitioners had purged themselves of the first civil contempt judgments against them when petitioners pleaded the privilege against self-incrimination upon their appearances before the Commission in October, 1961, after the affirmance of such contempt judgments, the Superior Court further made it explicitly clear that the Commission's subpoenas remained in full force and effect. The successive appearances of petitioners before the Commission in May, 1960 and October, 1961 and the ensuing time lapse between such appearances were unavoidable since they were due solely to an appeal by petitioners. Except for such time lapse, the appearances by petitioners were all in a single proceeding, namely, the same investigation by the Commission pursuant to the same subpoenas in which the Commission was—and still is—seeking to obtain from petitioners answers to the same questions. Hence, the proceedings before the Commission in May, 1960 and October, 1961 were not separate for the purposes of waiver and petitioners' waiver of the privilege against self-incrimination in their appearances in May, 1960 carried over to their appearances in October, 1961.

3. The first time that petitioners indicated they were relying upon federal incrimination the Commission speci-

fically advised petitioners that the Commission's conferral of immunity from prosecution did not extend to federal crimes and further that petitioners would be subject to contempt proceedings for their refusal to testify. Accordingly, the Commission never recognized a right in petitioners to claim *federal* incrimination. Further, the record shows that the Commission objected in the Superior Court that petitioners claimed in the first contempt proceedings against them that nothing more than a labor-management dispute was involved.

C. 1. Petitioners contended in the first contempt proceedings against them that the Commission's investigation constituted an unlawful interference with conduct that was not criminal and that was either affirmatively protected or exclusively governed by federal labor legislation. Such a contention subsumes of course the claim that the work stoppage was free of criminality. Indeed, petitioners specifically stated throughout the first contempt proceedings that no crimes had been committed. After affirmance of the first civil contempt judgment against them petitioners then completely changed their position and asserted that they feared that their testimony would incriminate them under federal law. Petitioners are accordingly estopped from claiming the privilege against self-incrimination.

2. The court below held that the objection of estoppel was not available to the Commission because the Commission had not made this objection in the Superior Court. First, this is an issue which the courts will consider *sua sponte* because the integrity of the judicial process is at stake. Further, the record shows that the Commission did in fact object in the Superior Court that petitioners were making inconsistent claims and were playing fast and loose with the courts.

D. Petitioners' asserted fear of federal incrimination is chimerical. Petitioners *testified* in the Superior Court to the effect that they feared incrimination under federal penal laws prohibiting theft from interstate commerce or within the special maritime and territorial jurisdiction of the United States. The claim that the work stoppage involved a scheme to commit a theft is completely fanciful. In addition, petitioners also *argue* that they fear federal incrimination under the Hobbs anti-racketeering statute, the anti-trust laws and the Civil Rights Laws. These claims are also fanciful and moreover some of these statutes are mutually exclusive of one another. The fact is that petitioners have taken whatever position has seemed expedient at the moment without any regard for the truth and petitioners' claimed fears of federal incrimination cannot be credited.

II

Petitioners do not have a constitutional right to refuse to testify upon the ground that the Commission grant of immunity from prosecution extended only to state and not to federal crimes.

A. The decision by this court in *Malloy* v. *Hogan* (No. 110 this Term) concerning the applicability of the Fifth Amendment to the States does not control the instant case. This Court has heretofore held in a long line of decisions that the Fifth Amendment does not permit a federal witness to refuse to testify on the ground of incrimination under state laws. Hence, it has never been thought that the Fifth Amendment protects a witness against incrimination under the laws of another jurisdiction. So, even assuming the applicability of the Fifth Amendment to the States, it in no respect follows that petitioners in this case could refuse to testify on the ground that they will be incriminated under federal law, which is an entirely independent question.

B. The Court should adhere in this case to its previous decisions that a state witness who has been granted immunity from state prosecution cannot refuse to testify upon the ground of federal incrimination. The people of this Country through their duly elected representatives in the State legislatures have made the policy judgment that the efficacy of state investigative powers requires that a state immunity witness should not be excused from giving testimony because of claimed foreign incrimination. Petitioners seek to have the Court override this policy judgment and in effect nullify the state immunity statutes, for it is perfectly plain that a state immunity witness could avoid testifying by the simple expedient of claiming federal incrimination. The immunity statute is a recognized and long-established method of compelling testimony which would otherwise be unavailable and is indispensable to effective law enforcement. Immunity statutes are in force throughout the entire Country. Surely, the Court will be slow in overriding as a violation of due process a policy judgment that has prevailed so widely and for so long among the people of this Country.

The fear of federal prosecution by state witnesses is chimerical. The federal prosecution involved in *Feldman v. United States,* 322 U. S. 487, is a legal sport that has never happened before or since. The Court should not anticipate harm to petitioners and reach out gratuitously to decide a constitutional question of fundamental importance. Rather, the time to reach such question is when and if petitioners' testimony is sought to be used against them in a subsequent federal prosecution.

C. If the Court should be of the view that petitioners must be protected against federal incrimination before their testimony may be compelled, then the Court should overrule *Feldman* which permits the use of state immunity testimony in a federal prosecution. This will be the most reasonable accommodation of the competing interests involved in this case. The state witness would be protected and an indispensable tool of law enforcement would be preserved to the States. Further, such an accommodation would be consonant with the constitutional distribution of powers between the States and the Nation because the primary duty of enforcing criminal justice rests upon the States in our form of federalism.

III

Petitioners' other contentions respecting the within civil contempt judgments (that they were entitled to a jury trial; that they were entitled to a trial on the issue of their good faith; that they were entitled to know what information was contained in the Commission files; and that they were denied the equal protection of the laws) are plainly without substance.

ARGUMENT

POINT I

Petitioners cannot validly claim the privilege against federal incrimination because they waived the privilege, because they are estopped from asserting the privilege, and because there is no reasonable basis for their asserted fear of federal incrimination.

A. The questions of waiver, estoppel, and reasonableness are federal questions properly before, and cognizable by, this Court.

In their original appearances before the Commission in this investigation, petitioners specifically stated that they were not claiming any privilege against self-incrimination. Rather, they contended in the first contempt proceedings against them not only that their conduct was innocent and lawful but that their conduct was affirmatively protected by federal labor legislation. Then, after the court below (the Supreme Court of New Jersey) affirmed the original civil contempt judgments and this Court denied review, petitioners, in a cynical *volte face,* proceeded to claim the privilege against self-incrimination.

The Commission argued in the court below that the claim of federal incrimination was unavailable to petitioners because (a) petitioners had waived the privilege, (b) petitioners are estopped from asserting the privilege, and (c) petitioners had no reasonable basis for their asserted fear of federal incrimination. The court below held (a) that the objection of waiver was not available to the Commission because the Commission had not made this objection in the court of first instance (the Superior Court) and further that the Commission had recognized petitioners' right to claim the privilege (R. 222); (b) that the objection of estoppel was not available to the Commission because the Commission had not made the objection in the court of first instance (R. 222); and (c) that it was unnecessary to decide the question of reasonableness since petitioners did not have a constitutional right to refuse to testify upon the ground of federal incrimination (232).

1. The decision by the court below that the objections of waiver and estoppel were not available to the Commission because the Commission had not asserted these objections in the Superior Court and that the Commission had recognized petitioners' right to claim the privilege is of course not conclusive here. As appears more fully hereinbelow, the record shows that the Commission never recognized a right in petitioners to claim federal incrimination and further that the Commission did assert the objections of waiver and estoppel in the Superior Court. In any event, the Commission, as the respondent herein, may urge any ground that appears in the record in support of the *civil* contempt judgments herein. E.g., *United States* v. *American Ry. Express Co.*, 265 U. S. 425, 435-436; *Langnes* v. *Green*, 282 U. S. 531, 538-539. An "appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." *United States* v. *American Ry. Express Co., supra,* at page

435. Indeed, this Court has entertained argument in support of a judgment that was made for the first time upon oral argument in this Court. *Marshall* v. *Pletz,* 317 U. S. 383, 389-390.

2. Moreover, the questions of waiver, estoppel and reasonableness with respect to petitioners' right to claim federal incrimination are federal questions that are cognizable by this Court. For, "This Court will review or independently determine all questions on which a federal right is necessarily dependent." *United States* v. *Pink,* 315 U. S. 203, 217. E.g. *Sola Electric Co.* v. *Jefferson Electric Co.,* 317 U. S. 173 (whether patent licensee is estopped from challenging price fixing clause in agreement as being invalid under the Sherman Anti-Trust Act is a federal question). Plainly, the question of when and in what circumstances a claim of federal incriminations based upon the United States Constitution may be asserted is a question that requires uniform treatment and cannot properly be subject to the vagaries of local law. This would particularly be true in the event that the Court should hold in *Malloy* v. *Hogan* (No. 110 this Term) that the self-incrimination clause of the Fifth Amendment is applicable to the States through the due process clause of the Fourteenth Amendment. See *Ker* v. *California,* 374 U. S. 23 (reasonableness of state search and seizure a federal question); *Fahey* v. *Connecticut,* 84 Sup. Ct. 229 (whether introduction of illegal search and seizure evidence in state prosecution was harmless error a federal question).

B. Since petitioners in their original appearance before the Commission specifically asserted that they were not refusing to testify upon the ground of self-incrimination, petitioners have waived the privilege against federal incrimination.

1. In their original appearances before the Commission in this investigation on May 19, 1960, both petitioners

specifically waived the privilege against self-incrimination. Thus, upon petitioner Murphy's original appearance before the Commission on May 19, 1960, the following ensued:

> "William Murphy, residing at 218 Roosevelt Street, Union City, New Jersey, appearing as a witness, having been duly sworn, testified as follows:
>
> By Mr. Sirignano:
>
> Q. Mr. Murphy—
>
> Judge Wall: Just a minute.
>
> Pardon me, Mr. Sirignano, would you kindly outline the purpose of this meeting?
>
> Mr. Sirignano: Yes.
>
> Judge Wall: For the purpose of the record.
>
> Mr. Sirignano: This is an investigation pursuant to the powers vested in the Commission in the Waterfront Commission Compact, to determine whether there are any violations of the Waterfront Commission Compact in the pending work stoppage at the Hoboken Piers.
>
> Judge Wall: In a pending work stoppage?
>
> Mr. Sirignano: Yes.
>
> Judge Wall: There are no accusations existing.
>
> Mr. Sirignano: That is an investigation, Judge Wall. At the present time there are no accusations made against any person subject to the jurisdiction of this Commission.
>
> Judge Wall: Now, what I would like to know is: Is this a labor dispute, strictly and purely?
>
> Mr. Sirignano: Mr. Wall, we are conducting an investigation to determine the true nature of this work stoppage.
>
> Judge Wall: To determine the true nature?
>
> Mr. Sirignano: Until we get the facts, we will be unable to determine that." (R. 201-202)

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"Judge Wall: But I don't see where there's any relevancy concerning a labor dispute with this particular Bi-State agency. I think it's an NLRB situation.

Mr. Sirignano: That is what we are asking questions to determine, the true nature of this work stoppage, to see whether it's a labor dispute or whether there's violations of both the criminal law or the compact.

Now, we're not going to know that until we get the facts from all sources and Mr. Murphy is one of the sources.

Judge Wall: Well, there's nothing wrong here, you say, except a work stoppage?

Mr. Sirignano: I didn't say anything of the sort. I don't know if there is anything wrong at this point. We haven't got all the facts yet.

Judge Wall: Is there any basis to hold the investigation and not let this matter go through its proper channels with the National Labor Relations Board? That's a Governmental agency.

Mr. Sirignano: This Commission has the power to conduct an investigation regardless of the authority or the jurisdiction of the National Labor Relations Board if it effects the Compact.

Judge Wall: Provided that they do not infringe upon a man's rights. I mean we have to protect the man's rights.

Mr. Sirignano: That's absolutely right, but the rights you raised are that he is not protected. He is to answer questions or to claim the right of self-incrimination. But if you raise an objection against it because he might be adversely effected in a civil litigation, that is no bar to his testifying here.

Judge Wall: Well, I don't agree with you. I'd like an opportunity to check it.

Mr. Sirignano: A work stoppage is pending. It's a question of finding out what the facts are, as quickly as we can, and if there's some action to be taken, we have to do it. We cannot delay it any longer. It's already since Monday that it's going on, not yesterday or today.

Judge Wall: Well, if it's a labor dispute, Mr. Sirignano, why not let the NLRB do the job?

Mr. Sirignano: We don't know that yet.

Judge Wall: I don't think you have jurisdiction in this matter. I want to check it.

Mr. Sirignano: Mr. Wall, we may not have jurisdiction ultimately, if the facts show it's just a labor dispute, but on the other hand, we have the jurisdiction to find out what the facts are, and we are having a fact finding investigation.

Judge Wall: You're having a fact finding investigation to see if you have jurisdiction.

Mr. Sirignano: To see if there's any violation of the Compact.

Judge Wall: This is a labor dispute, Mr. Sirignano, and you have no jurisdiction. You're looking for jurisdiction, according to your own statement.

Mr. Sirignano: Mr. Wall, I'm going to ask Mr. Murphy some questions. You can put your objections on the record, as to whether you are going to permit him or advise him to answer the questions or not, and if we feel that after he has taken that position he is in contempt, we'll proceed to contempt. That's the choice you have to make. Either you are going to have to answer the questions or raise a rightful privilege to refuse him to answer, and I assure you he will have to answer.

Judge Wall: I note my objection on the record that this is a pure and simple labor dispute. That the Bi-State does not have any jurisdiction. There are no charges pending here, and it's strictly to find certain facts out, if there are any, if they exist, to obtain jurisdiction. And, that is putting the cart before the horse, in my humble opinion." (R. 203-204)

* * * * * *

"Judge Wall: See—you want to take this off the record? He's threatened with a suit. He's threatened with everything, as usually happens in strike situations, to get it settled. Now, for him to come over here and testify when this should be before the National Relations Board, I don't think it's fair to this man.

Mr. Sirignano: Mr. Wall, what you are saying is just as a man may be sued simply for a criminal act, the criminal prosecution should stop until the civil suit is settled.

Judge Wall: No, there's no crime here.

Mr. Sirignano: We don't know, there may very well be a crime here.

Judge Wall: But you're looking for jurisdiction over something. You don't know if you have it.

Mr. Sirignano: You don't know if there's a crime, only after you collect the facts and investigate." (R. 208)

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"Judge Wall: We have come to the conclusion that there be no further testimony, on the grounds that we question the jurisdiction, and we say this is purely a labor dispute.

Mr. Sirignano: In other words, Mr. Murphy is going to take the position to any questions that I put to him that he refuses to answer on the grounds that the Commission has no jurisdiction to ask these questions; is that correct, sir?

Judge Wall: Has no jurisdiction in this matter at all.

Mr. Sirignano: And, therefore, we cannot ask the questions and we should not expect an answer; is that correct, sir?

Judge Wall: Yes.

Q. Mr. Murphy, is that your position?

A. That's right.

Q. You are going to refuse to answer, on the grounds that the Commission does not have the jurisdiction to conduct this investigation; is that correct, sir?

Judge Wall: In this particular labor dispute.

Mr. Sirignano: In the investigation as related to in this record in the interrogation.

Judge Wall: Coupled with the fact that you yourself said that you do not know whether you are in it or out of it.

Q. Is that correct, Mr. Murphy?

A. That's right.

Q. You do not claim to assert your right against self incrimination, is that correct; sir?

Judge Wall: He doesn't take the Fifth Amendment, no.

Q. Is that right?

Mr. Sirignano: I want it from Mr. Murphy.

A. That's right.

Q. You're not taking the Fifth Amendment, you are not claiming that any of these questions will self incriminate you?

A. No.

Judge Wall: You're not taking the Fifth Amendment?

Mr. Murphy: No.

Q. Mr. Murphy, any future questions that I ask you, you will take that same position?

A. That's right.

Q. Now, for the record, Mr. Murphy, did you have anything to do with causing the strike that is presently pending at the American Export Line?

Judge Wall: He is not answering.

A. I am not answering.

Q. On the same grounds?

A. That's right.

Q. Did you, in any way, participate in this work stoppage to compel the American Export Line to discharge, or to limit the duties of an employee by the name of James Markley?

A. I'm not answering.

Q. On the same grounds?

A. Yes.

Mr. Sirignano: No further questions (3:37 P.M.)." (209-211)

* * * * * *

And in petitioner Moody's original appearance before the Commission on May 19, 1960, the following ensued:

* * * * * *

"Mr. Florio: Prior to the inception of the interrogation, might I ask, for the benefit of myself and on behalf of my client, what the purpose of the investigation is in order that I may so advise Mr. Moody what his rights are.

Mr. Piazza: Mr. Florio, the purpose of the investigation is to ascertain facts surrounding a work stoppage at Piers "A", "B" and "C", Hoboken, New Jersey.

Mr. Florio: Yes.

Mr. Piazza: Fair enough?

Mr. Florio: That's good enough.

Q. Mr. Moody, you are a union official?

A. Yes.

Mr. Florio: Mr. Piazza, now, I am going to make a continual objection on behalf of Mr. Moody: One, this is an investigation proceeding for the record which may in the future become a public document; two, it is the opinion of myself that in this matter it is strictly a matter for labor and management and that the Waterfront Agency has no jurisdiction whatsoever. It is my opinion that the purpose of the Waterfront Commission for the New York and New Jersey Port of Metropolitan Area is solely for the purpose of maintaining peace, safety, protection of crime along the waterfront and on the piers. And

I reiterate that this matter does not come within the jurisdiction of the Waterfront Compact, and in that respect I will advise my client, Mr. Moody, to say nothing at this hearing.

Mr. Piazza: This is not a hearing.

Mr. Florio: Or at this—

Mr. Piazza: This is an investigation.

Mr. Florio: At this interrogation.

Mr. Piazza: This interrogation is for the purpose of collecting facts concerning the work stoppage. Now, do I understand you to state essentially that we are without jurisdiction in this matter since it is a labor dispute?

Mr. Florio: A labor and a management problem as of this moment.

Mr. Piazza: What did you mean by a labor-management problem?

Mr. Florio: That there is an authority called The New York Shipping Association which has full jurisdiction over matters such as these.

Mr. Piazza: Well, I overrule your objection and I direct Mr. Moody to answer the questions when I put them to him." (R. 188-189)

* * * * * *

"Q. Mr. Moody, within the last week have you attended any conferences with the officials of the American Export Line with respect to the work stoppage at Piers "A", "B" and "C" in Hoboken?

Mr. Florio: I object to this question, one, I would state that any communication between any union official or any between management and labor is certainly a privileged one and—

Mr. Piazza: Privileged on what theory?

Mr. Florio: Privileged between management and labor.

Mr. Piazza: On what theory?

Mr. Florio: Privilege between labor and management under the existing contract between the New York Shipping Association and International Longshoremen's Association.

Mr. Piazza: I know of no privilege and I find your objection insufficient and defective of law and I overrule that.

You must answer the question, Mr. Moody. I direct you to answer.

Mr. Moody: I am not answering on advice of my counsel." (R. 191)

* * * * * *

"Mr. Piazza: Mark the appearance of Mr. Sirignano, General Counsel.

By Mr. Sirignano:

Q. Mr. Moody, I understand that you have taken the position that you are not going to answer any questions here; is that correct, sir?

A. That's correct.

Q. Do you understand that we are conducting an investigation to determine whether any violations of the Compact are being committed in connection with the present work stoppage at the American Export Lines at Piers A, B and C in Hoboken? You understand that?

Mr. Florio: He has been so advised, Mr. Sirignano.

Q. And that in connection with that investigation you have been subpoenaed here and you are here pursuant to a subpoena; is that correct, sir?

A. It must be.

Q. And you are represented by counsel?

A. That's right.

Q. And Mr. Piazza has put certain questions to you; is that right?

A. Correct.

Q. Now, you have refused to answer those questions, and what are your grounds, please?

A. On advice of my counsel.

Q. That's not a legal ground. Do you want the counsel to state the grounds for you?

Mr. Florio: I have already made a continuing objection.

Would you read it from the record, please.

Would you note the appearance of two other gentlemen in this room.

Mr. Sirignano: Myles Ambrose, Executive Director and Mr. White, Assistant Counsel.

As I understand, Mr. Florio, your objection to the questions that were asked Mr. Moody is on the grounds that we lack jurisdiction in this matter is that correct? You are not claiming or Mr. Moody is not claiming any rights against self-incrimination; is that correct?

Mr. Florio: Not at this time.

Mr. Sirignano: At this time you are not claiming any such rights?

Mr. Florio: When the question arises and we feel any questions would involve any self-incrimination to Mr. Moody, I will so advise him.

Mr. Sirignano: You are now objecting solely to the jurisdiction of this Commission to conduct this investigation?

Mr. Florio: Right.

Mr. Sirignano: We make note of your objections, Mr. Florio, and we direct Mr. Moody to answer. Now, do you want to proceed with the interrogation? Your objection is on the record. He is directed to answer at this point." (R. 194-195)

A witness may of course waive the privilege against self-incrimination. "If the witness intelligently and unequivocally waves any objection based on the Self-Incrimination Clause, or if the witness refuses a committee request to state whether he relies on the Self-Incrimination Clause, he cannot later invoke its protection in a prosecution for contempt for refusing to answer that question." *Emspak*

v. *United States,* 349 U. S. 190, 195 (held upon the facts that the witness had not relied exclusively upon the First Amendment in refusing to testify but had also invoked the Fifth Amendment). Here, not only did petitioners fail to assert the privilege against self-incrimination but they specifically asserted that they were not relying upon the privilege through an entire round of litigation. It follows ineluctably that petitioners waived the privilege against self-incrimination in this investigation.

2. Petitioners contend that any waiver of their privilege in their first appearance before the Commission on May 19, 1960 does not carry over to their subsequent appearances before the Commission on October 3rd and 27th, 1961. Petitioners contend, rather, that their latter appearances in October, 1961 constituted a separate and distinct proceeding for the purposes of waiver. In this connection, petitioners point to the fact that when they appeared before the Superior Court on October 4, 1961 (after having pleaded self-incrimination but before having been granted immunity) the Superior Court ruled that petitioners had purged themselves of the first civil contempt judgments against them (R. 45).

However, the Superior Court further made it explicitly clear that the Commission's subpoenas remained in force and effect and that petitioners were still required to appear at the offices of the Commission pursuant to the Commission's subpoenas (R. 45). And in accordance with such oral decision the Superior Court signed an order dated October 4, 1961 purging petitioners of their contempt but also requiring petitioners to appear before the Commission pursuant to the Commission's subpoenas (R. 46-47). Indeed, petitioners were unsuccessful in their contention in the court below that the Superior Court had committed error in not holding that the Commission's subpoenas had spent their force and in not requiring the Commission to issue new subpoenas (R. 232-233).

It has been held upon exactly comparable facts that the proceedings were not separate for the purposes of waiver. *United States* v. *St. Pierre,* 132 F. 2d 837 (2nd Cir. 1942), appeal dism'd 319 U. S. 41. In *St. Pierre,* the defendant therein had been convicted of contempt for refusing to testify before a grand jury, and after his conviction had been affirmed by the Second Circuit he was recalled before the same grand jury to answer the same question. Again defendant refused to answer and again the Second Circuit affirmed defendant's conviction for contempt. This decision by the Second Circuit in the *St. Pierre* case is discussed by the Second Circuit in its subsequent decision in *United States* v. *Maranti,* 253 F. 2d 135, 140 (2nd Cir. 1958), as follows:

> ". . . In United States v. St. Pierre, 2 Cir., 132 F. 2d 837, 147 A.L.R. 240, appeal dismissed St. Pierre v. United States, 319 U. S. 41, 63 S. Ct. 910, 87 L. Ed. 1199, defendant had been held in contempt for refusing to answer a question before a grand jury. After we had affirmed his conviction in 2 Cir., 128 F. 2d 979, he was recalled before the same grand jury to answer the same question. Again he refused and again he was held in contempt. In affirming this second conviction we assumed, without discussion, that the proceedings were not separate and that a waiver in the former hearing carried over to the latter. But there the considerable time lapse between the successive proceedings was unavoidable, for it was due solely to the appeal; and except for this time lapse, the case involved a continuing interrogation before the same grand jury for the same purposes. That situation does not exist here, where, for all practical purposes, two separate grand juries investigated unrelated crimes."

Here, as in *St. Pierre,* the successive appearances and the ensuing time lapse were unavoidable since they were due solely to an appeal by petitioners and, except for such time lapse, the appearances by petitioners were all in a single proceeding, namely, the same investigation by the Commission pursuant to the same subpoenas in which the Commission was—and still is—seeking to obtain from petitioners answers to the same questions.

The decisions in New Jersey are even stronger against petitioners. Thus, when two grand juries had investigated the same subject matter, "a waiver barring their [the defendants therein] right to assert the privilege at their second inquiry may be constructed" when the questions asked before the second grand jury were the same as those answered before the first grand jury without claim of privilege. *State* v. *Fary*, 19 N. J. 431, 440 (1955). And see *State* v. *Decola*, 33 N. J. 335, 340 (1960), also indicating that, if a second grand jury had investigated the same matter as an earlier grand jury, testimony by a witness before the earlier grand jury without claim of the privilege would have constituted a waiver of the privilege before the second grand jury.

3. As noted, the decision by the court below that the Commission had recognized petitioners' right to claim the privilege is in no respect conclusive upon this Court. And in point of fact, the record herein shows that at no time did the Commission recognize a right in petitioners to plead *federal* incrimination.

When petitioners appeared before the Commission on October 3, 1961 after the affirmance of the civil contempt judgments against them, petitioners pleaded the privilege against self-incrimination. The Commission recognized this plea and adjourned the subpoenas in order to give the Commission an opportunity to determine whether to grant petitioners immunity from prosecution pursuant to the provisions of Section 5-b(5) of the Waterfront Commission Act and, if so, to afford the Commission an opportunity to give the notice required by Section 5-b(5) to the appropriate state law officials (Murphy, R. 26-31; Moody, R. 42-43).

During their appearance on October 3, 1961, petitioners did not in any respect indicate that they were relying upon *federal* incrimination and, of course, the Commission only had the power to confer immunity from *state* prosecution. The first time the petitioners indicated that they were relying upon *federal* incrimination was during their appearance before the Commission on October 27, 1961 when petitioners were granted immunity from prosecution and directed to answer (R. 57, 73). The Commission thereupon specifically advised petitioners that the Commission's conferral of immunity did not extend to federal crimes (R. 57-58) and further that petitioners would be subject to contempt proceedings for their refusal to testify (Murphy, R. 71-72; Moody, R. 82). The Commission accordingly never recognized a claim of *federal* incrimination by petitioners.

The court below also held respecting the question of waiver that the Commission had not made this objection in the Superior Court. First, since the Commission appears before this Court as the respondent upon the instant review of the *civil* contempt judgments against petitioners, the Commission, as noted, may urge any ground that appears in the record in support of the judgments herein. Further, and apart from this, the Commission specifically objected in the Superior Court that petitioners were playing "fast and loose" with the Court in that in the first contempt proceedings against them petitioners claimed that nothing more was involved than a labor-management dispute which the Commission did not have the power to investigate and that now, in order to justify their plea of self-incrimination after the affirmance of the first civil contempt judgments against them, petitioners were claiming that all kinds of criminal activities were involved (R. 109-110).

C. Since petitioners contended in the first contempt proceeding that the Commission's investigation constituted an unlawful interference with conduct that was not criminal and that was either affirmatively protected or exclusively governed by federal labor legislation, petitioners are estopped from taking the inconsistent position in this contempt proceeding that their testimony may implicate them in violations of federal criminal law.

As seen, petitioners in their original appearances before the Commission on May 19, 1960 contended that there was no jurisdiction for the Commission's investigation because there were no crimes committed and nothing more than a labor dispute was involved. The Commission's position, on the other hand, was that the Commission could not determine what was involved until it had all the facts, including the testimony of petitioners.

Petitioners persisted in their contention that no crimes were committed and that nothing more than a labor dispute was involved in the contempt proceedings instituted against them by the Commission upon their refusal to testify in May, 1960. Thus, in a signed answer submitted by counsel for petitioner Murphy in the first contempt proceeding, which answer was verified by the petitioner Murphy, himself (R. 198-200), the following was stated (R. 199):

> "5. There does not exist any accusation or charges setting forth a reason for intermeddling in a purely labor situation, in fact, William P. Sirignano, General Counsel and Hearing Officer in the instant matter, so stated at the hearing.
>
> 6. William Murphy appeared, was sworn and answered certain questions, contrary to the allegations as made in Paragraph Thirteen of the Notice of Motion. William Murphy qualified his refusal to an-

> swer stating that he was threatened with a suit, that a labor dispute was in progress and he felt that any requirements to answer would deprive him and the members of Local 2 aforesaid, of their rights under the Fourteenth Amendment of the Constitution of the United States, and further, that the Waterfront Commission of the Port of New York had no jurisdiction in the labor problem. In this way, he legally qualified his reasons for not answering the questions asked.
>
> * * *
>
> 8. In conclusion, it is apparent that a labor dispute exists under full control of the United States Government, National Labor Relations Board, and to allow the Waterfront Commission of the Port of New York to intermeddle, would lead to the impairment of the existing contractual relationship between Labor and Management.''

And, upon their appeal in the first contempt proceeding, petitioners contended, in the words of the court below, as follows: "(1) that the investigation adversely affects or limits 'the right to strike' which is expressly reserved by the Waterfront Commission Act (N.J.S.A. 32:23-68); and (2) that the Commission's power to investigate is in conflict with and therefore pre-empted by the Labor Management Relations Act (LMRA) (29 U.S.C.A. § 141 et seq.)" (35 N. J. 62, 66). In other words, as is made clear in the first opinion herein by the court below (35 N. J. 62), petitioners contended that the work stoppage was a lawful labor strike affirmatively protected by federal labor legislation or, alternatively, a matter within the exclusive purview of the Labor Management Relations Act. Such a contention subsumes of course the claim that the work stoppage was free of any criminality, such as theft from interstate commerce.

In fact, petitioners specifically represented in their brief in the court below the following (R. 185):

> "During the period commencing May 16 and ending May 25, 1960, the Commission does not allege, nor were there any acts of violence committed; there were no pickets, picketing, or demonstrations; no person was assaulted or intimidated; no crimes were committed; no property was damaged; the streets were not blocked or obstructed and traffic in and out of the piers was not impeded."

And upon their appeal to this Court after the affirmance by the court below of the first contempt judgments against them and prior to the grant of any immunity, petitioners represented the following in their jurisdictional statement (pp. 22-23):

> "The question here presented, as to the constitutionality of the Compact as construed and applied in the decision below, is substantial, then, in the most weighty degree. The question is not governed by the DeVeau case [*DeVeau* v. *Braisted*; 363 U. S. 144], as above shown, for here there is not brought into play, either factually or analytically, the crime-prevention features which were decisive in DeVeau; here, rather, the whole realistic brunt of the state police power is upon a traditional type of labor-dispute situation which is not shown by even remotely adequate record proofs to partake of a 'crime' element."

Now, after a judicial determination that there was statutory jurisdiction for the Commission's investigation and after affirmance of the original civil contempt judgments requiring petitioners to testify, petitioners have the temerity to assert that their testimony may incriminate them under federal penal laws. Surely, this kind of intentional self-contradiction will not be countenanced and petitioners will not be permitted to toy with the courts in this fashion. Petitioners, by litigating all the way to this Court their claim that nothing more was involved herein than a labor dispute which the Commission did not have jurisdiction to investigate, were able to delay this investigation for a year and a half. Cf. *National Association for the Advancement of Colored People* v. *Alabama,* 360 U. S. 240 (in contempt proceeding against NAACP, where this Court's prior decision was based on premise that NAACP had complied with court order to produce documents except as to its membership lists, which was not denied by the State of Alabama, the State of Alabama was bound by this position and could not subsequently claim that the NAACP had failed in other respects to comply with the court order). *Scarano* v. *Central R. Co. of New Jersey,* 203 F. 2d 510, 512-13 (3rd Cir. 1953) (railroad employee who received large settlement after personal injury trial in which he claimed permanent disablement was estopped from subsequently suing for reinstatement to his job with railroad). See the numerous decisions collected in Beck, *Estoppel Against Inconsistent Positions In Judicial Proceedings,* 9 Brooklyn Law Review 245 (1940).

2. The court below held that the objection of estoppel was not available to the Commission because the Commission had not made this objection in the Superior Court (R. 222).

First, this is an issue which not only concerns the parties but in which the courts, themselves, have an interest since the integrity of the judicial process is at stake. The question of estoppel therefore is an issue which the courts may consider *sua sponte.* Further, the Commission appears before this court as the respondent, and accordingly may, as noted, urge any ground that appears in the record in support of the judgments herein. Finally, the Commission specifically objected in the Superior Court that petitioners were taking inconsistent positions and were playing "fast and loose" with the courts so that the Commission did make this objection in the Superior Court (R. 109-110).

Petitioners in their brief suggest that it is the Commission which has been inconsistent because, according to petitioners, in the first contempt proceedings the Commission emphasized the theme of crime whereas in the instant (and second) contempt proceedings the Commission deprecates petitioners' claim that they fear self-incrimination under federal law. Actually, as appears from the printed appendix in the original contempt proceedings, copies of which are on file with the Court, the Commission's contempt motion in the first contempt proceeding is identical *in haec verba* with the Commission's contempt motion in the second (and instant) contempt proceeding, except that the Commission's second contempt motion relates the events that occurred subsequent to the institution of the first contempt proceedings.

D. Petitioners have no reasonable basis for their asserted fear of federal incrimination.

The work stoppage in this case occurred several years ago in May, 1960. No federal prosecutor in the almost four years that have passed has evinced the slightest interest in this matter. In point of actual fact, petitioners have no reasonable basis whatever for their asserted fear of federal incrimination. (The phrase "reasonable basis" is intended not as any substantive test for determining whether petitioners were justified in their claim of federal incrimination but rather simply as a shorthand reference to the standard laid down in *Hoffman* v. *United States*, 341 U. S. 479, for determining the incriminatory nature of testimony, which standard is assumed here. Since petitioners' fears of federal incrimination are entirely chimerical, petitioners are not justified in refusing to testify under the standard laid down in *Hoffman* irrespective of how that standard may be verbalized.)

Under the decision in *In re Boiardo*, 34 N. J. 599 (1961), it was incumbent upon petitioners herein to pinpoint, under oath and hence under penalty of perjury, the areas of federal criminal involvement which they feared and to establish that their fear of federal incrimination had a reasonable basis. "The area [of incrimination] must be pinpointed to the extent to which it is possible to do so without eliciting a hurtful answer * * *. But it is the witness, and not counsel, who must so state, and must do so under oath, for it is the penalty of perjury which is the sole assurance against a spurious assertion of a claimed apprehension." *In re Boiardo, supra*, 34 N. J. at p. 604.

In accordance with the decision in *Boiardo*, petitioners voluntarily took the stand for the purpose of pinpointing the areas of federal criminal involvement that they feared. (Since petitioners have already voluntarily testified, the question whether *Boiardo* is comportable with federal constitutional standards relating to the privilege against self-incrimination is immaterial.)

Petitioner Murphy testified that he feared incrimination only under a federal penal law prohibiting theft from interstate commerce (R. 132). Petitioner Moody specified three areas as to which he feared incrimination under federal law: (1) thievery, (2) "to compel the company or anybody else that there's got to be certain people to go on there" [the pier]; and (3) "any cargo that comes into the United States on a ship is ICC" (R. 139-140). Answer (2) does not show any area of federal criminal involvement. And by answer (3), petitioner Moody apparently was referring to thefts within the special maritime and territorial jurisdiction of the United States (see petitioners' brief, p. 55). Accordingly, for petitioners' claimed fear of federal incrimination to have any validity, it must rest upon the premise that the work stoppage could reasonably have been some kind of conspiracy to commit a theft.

Petitioners' claim of federal incrimination based upon theft is inherently incredible. It taxes credulity that petitioners would consider it necessary to engage in a general work stoppage involving hundreds of men and lasting four days to remove Markley from the piers simply in order to commit a theft, particularly since a work stoppage would only focus widespread attention upon themselves and, as they doubtless knew, bring Commission investigators to the scene. Moreover, Markley's presence on the piers was nothing new because he had been previously assigned to the same piers as a Commission investigator.

Petitioners' claim that they fear federal incrimination does not of course bind anyone. The "protection [the privilege against self-incrimination] must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. Mason v. United States, 1917, 244 U. S. 362, 365, 37 S. Ct. 621, 622, 61 L. Ed. 1198, and cases cited. The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, Rogers v. United States, 1951, 340 U. S. 367, 71 S. Ct. 438, and to require him to answer it if 'it clearly appears to the court that he is mistaken'. Temple v. Commonwealth, 1880, 75 Va. 892, 899." *Hoffman* v. *United States, supra,* 341 U. S. at page 486. Here, we deal with nothing more substantial than the phantasmagoria of petitioners, who certainly have been something less than completely candid in their claims in these contempt proceedings and who are now using the privilege simply as a pretext by which to defeat the Commission's investigation.

Petitioners further assert in their brief (p. 54) that the work stoppage may be incriminatory by virtue of 18 U.S.C. § 1951 (the Hobbs anti-racketeering statute), which would be applicable only if the work stoppage were for the purpose of extortion. However, petitioners' sworn testimony before the Superior Court was that in effect they feared incrimination only for theft.

Petitioners also assert in their brief (p. 54) that they may be incriminated under the federal anti-trust laws. Again, petitioners' sworn testimony in the Superior Court was that in effect they feared incrimination respecting only theft. Moreover, a union violates the federal anti-trust laws only when it executes an agreement with an employer in the suppression of competition. E.g., *Allen Bradley Co. v. Local 3, Electrical Workers,* 325 U. S. 797. In the absence of such concerted action between the employer and the union, there can be no violation of anti-trust laws. E.g., *Weir* v. *Chicago Plastering Institute,* 272 F. 2d 883 (7th Cir. 1959). Obviously, here the ILA was not working in cooperation with the American Export Lines to suppress competition. Also, it is difficult to conceive, to say the least, how petitioners can honestly fear incrimination under both a federal law prohibiting theft from interstate commerce or extortion and the anti-trust laws.

Petitioners also assert in their brief (pp. 54-55) that they may be incriminated under the Civil Rights Law, which prohibits any conspiracy to injure or intimidate any citizen in the free exercise of his rights under the Consitution and laws of the United States. Again, petitioners swore in their testimony in the Superior Court that they feared incrimination respecting theft. Moreover, this claim is fanciful since there is no law of the United States assuring Markley the right to be the chief security officer of the American Export Lines. In this connection, it bears note that watchmen are outside the coverage of the Labor Management Relations Act (29 U.S.C. § 159(b)(3)). Plainly, in this litigation, petitioners are simply thrashing about for a federal statute upon which they can hang their claim of federal incrimination without any regard whatever for the truth.

Since it is perfectly plain that the claims by petitioners in this litigation have been made without any regard whatever for the truth, the sincerity of petitioners in their present claim that they fear federal incrimination is highly suspect, to say the least. Thus, petitioners claimed throughout the first round of litigation that nothing more was involved than a labor dispute which the Commission did not have jurisdiction to investigate. Then, petitioners proceeded to claim incrimination under federal penal laws that are mutually exclusive of one another, such as theft or extortion and the anti-trust laws. And even now, petitioners urge upon the Court as an alternative position herein that the Commission's investigation is an interference with the right to strike (petitioners' brief, pp. 93-94) or an inquiry into areas preempted by the Labor Management Relations Act (petitioners' brief, pp. 86-93). (Since this was not one of the questions presented by petitioners in their petition for certiorari, it is of course not properly before the Court.)

Petitioners ask what incrimination the Commission had in mind when it recognized petitioners' plea of the privilege against self-incrimination. Section 530 of the New York Penal Law makes it a misdemeanor where one person "with a view to compel another person to do or to abstain from doing an act which such other person has a legal right to do or to abstain from doing, wrongfully and unlawfully, uses violence or inflicts injury upon such other person or his family, or a member thereof, or upon his property or threatens such violence or injury." *In re Dolowich,* 246 App. Div. 209, 285 N. Y. Supp. 483 (1st Dept. 1936) (attorney disbarred after conviction under Penal Law, § 530, for his conduct in unlawfully coercing another to become a member of a corporation by threatening to injure and destroy his property). In this connection one of the questions asked petitioners and which they have been directed to answer by the contempt judgments herein is whether they had discussions with any executives of the American Export Lines either in Hudson County, New Jersey or New York County, New York, concerning Markley's employment (R. 178, 182). The possible violation of Section 530 of the New York Penal Law explains the

Commission's reference to the work stoppage in the contempt motion papers as an "illegal coercion" (R. 6). Apart from Section 530 of the New York Penal Law, the Commission does not know of any penal law, state or federal, under which petitioners could have incriminated themselves at the time that the Commission granted petitioners immunity from prosecution in October, 1961.

Finally, petitioners contend that they reasonably fear federal incrimination because there exists a policy of colloboration between the Commission and federal law enforcement officials, citing the statement by this Court in *Cleary* v. *Bolger,* 371 U. S. 392, 394, that the Commission was an agency which "worked in close cooperation with the Customs Service in matters of law enforcement on the waterfront". The record is bare of any evidence of cooperation between the Commission and federal law enforcement officers in *this* case. And a *general* policy of cooperation between state and federal law enforcement agencies obviously does not make petitioners' claimed fears of federal incrimination reasonable.

POINT II

Petitioners did not have a constitutional right to refuse to testify upon the ground that the Commission's grant of immunity from prosecution extended only to state, and not to federal, crimes.

A. The decision by this Court in *Malloy* v. *Hogan* (No. 110 this Term) concerning the applicability of the Fifth Amendment to the states does not control the instant case.

In its order granting certiorari herein (R. 242), the Court has directed that the instant case be argued immediately following *Malloy* v. *Hogan* (No. 110 this Term). The *Malloy* case presents the question whether the self-incrimination clause of the Fifth Amendment to the United

States Constitution is applicable to the States through the due process clause of the Fourteenth Amendment. Assuming for the purposes of argument that the Court should decide in *Malloy* v. *Hogan*, that the Fifth Amendment is applicable to the States, that would be the beginning, rather than the end, of inquiry in this case. For whether the Fifth Amendment permits a witness to refuse to testify upon the ground of incrimination under the laws of another jurisdiction is an independent question that involves entirely different competing considerations, as hereinbelow discussed in subdivisions B and C of this Point.

Heretofore, this Court has held in a long line of decisions that the Fifth Amendment does not permit a federal witness to refuse to testify on the ground of incrimination under state laws. *Brown* v. *Walker*, 161 U. S. 591 (federal witness given federal immunity); *Hale* v. *Henkel*, 201 U. S. 43 (same); *United States* v. *Murdock*, 284 U. S. 141 (no immunity granted, only state incrimination claimed by federal witness); *Hutcheson* v. *United States*, 369 U. S. 599 (no immunity granted, state criminal proceeding pending against federal witness). Particularly noteworthy is the fact that the first Mr. Justice Harlan, who dissented from the decision by this Court in *Twining* v. *New Jersey*, 211 U. S. 78 (adverse comment on state criminal defendant who did not testify), that the Fifth Amendment was not applicable to the States through the Fourteenth Amendment, concurred nonetheless with the decisions in *Brown* and *Hale* that a federal witness could not, under the Fifth Amendment, refuse to testify because of state incrimination. Conversely, this Court has repeatedly held from the beginning that a state witness who has been granted immunity from state prosecution cannot refuse to testify upon the ground of federal incrimination. *Jack* v. *Kansas*, 199 U. S. 372 (Harlan, J., concurring); *Knapp* v. *Schweitzer*, 357 U. S. 371; *Mills* v. *Louisiana*, 360 U. S. 230.

Hence, it has never been thought that the Fifth Amendment protects a witness against incrimination under the laws of another jurisdiction. So, even assuming the applicability of the Fifth Amendment to the States, it in no respect follows that petitioners in this case could refuse to testify upon the ground that they would be incriminated under federal law. That is an independent question to which we now turn.

B. The Court should adhere in this case to its previous decisions that a state witness who has been granted immunity from state prosecution cannot refuse to testify upon the ground of federal incrimination.

The people of this Country through their duly elected representatives in the State legislatures have made the policy judgment that the efficacy of the States' investigative powers requires that a witness who has been conferred with immunity from prosecution should not be excused from giving testimony because of claimed incrimination under the laws of another jurisdiction. This policy judgment is embodied in the many state immunity statutes which have been enacted against the backdrop of established constitutional doctrine that a state immunity witness cannot refuse to testify upon the ground of foreign incrimination.

Petitioners seek to have the Court override this policy judgment and in effect nullify state immunity statutes. For it is perfectly plain in view of the presently pervasive nature of federal law that a state immunity witness could avoid testifying by the simple expedient of claiming federal incrimination. This fact has been explicitly recognized by the Court, itself, in *Knapp* v. *Schweitzer, supra,* at pages 378-9, wherein it was stated: "In these days of the extensive sweep of such federal statutes as the income tax law and the criminal sanctions for their evasions, investigation under state law to discover corruption and misconduct, generally, in violation of state law could easily be thwarted if a State were deprived of its power to expose such wrongdoing with a view to remedial legislation or prosecution." Indeed, in this case, the court below held that the recently-enacted New Jersey statute expanding the privilege against self-incrimination to include federal incrimination was not intended to be applicable in the present situation because otherwise the immunity provisions of the Waterfront Commission Act would be nullified (R. 230-231). Hence, nothing less is involved in this case than the continued enforceability of every state immunity statute in the Country.

The immunity statute has an ancient and respectable lineage. "Such statutes . . . have for more than two centuries been the expedients resorted to for the investigation of many offenses, chiefly those whose proof and punishment were otherwise impracticable because of the implication in the offense itself of all who could bear useful testimony . . . the tradition of it as a lawful method of annulling the privilege against self-incrimination is unquestioned in English history." 8 Wigmore, *Evidence*, pages 492-3 (1961 ed. McNaughton revision). "[T]he constitutional enshrinement of this particular privilege [self-incrimination] in the United States leaves no other method available, and the frequent and increasing resort to it seems to show how necessary it is found to be. Bribery and other forms of political corruption have called chiefly for its aid; and, next, gambling, liquor selling, sundry frauds and monopolistic extortions; moreover, investigations upon all subjects by legislative committees are commonly thus facilitated." 8 Wigmore, *supra*, pages 496-7. In this Country the immunity statute knows no sectional limitations. It is in force in Georgia and Mississippi as well as New York, in Alaska and California as well as Massachusetts. 8 Wigmore, *supra*, pages 495-507, footnote 11.

Surely, the Court will be slow in overriding as a violation of due process a policy judgment that has prevailed so widely and for so long among the people of this Country. Indeed, it is practically self-contradictory to say that such a policy judgment violates due process as being not "consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as the 'law of the land'". *Hebert* v. *State of Louisiana,* 272 U. S. 312, 316. In illuminating contrast, this Court in ***Mapp*** v. *Ohio,* 367 U. S. 643, was dealing with police conduct which, by hypothesis, was contrary to our basic scheme of ordered liberty because the police conduct involved therein was unlawful in that it was in violation of the laws relating to arrests and searches that the States have universally adopted.

As against the vital interest of the States in the continued enforceability of state immunity statutes, which are indispensable to effective law enforcement, the fear of federal prosecutions by state witnesses is chimerical. It is true that the state immunity witness in *Feldman* v. *United States,* 322 U. S. 487, subsequently found himself the subject of a federal prosecution. But as Mr. Justice Black observed in his dissenting opinion in *Feldman,* at p. 495: "Never since the Bill of Rights was adopted, until today, has this Court sustained a single conviction for a federal offense which rested on self-incriminatory testimony forced from the accused." And the Second Circuit stated in its decision in *Feldman* (136 F. 2d 394, 398) that "It seems surprising that neither the researches of counsel nor those of this court have uncovered any precise authority."

In other words, the federal prosecution involved in *Feldman* wherein use was made of state immunity testimony was a legal sport that has not repeated itself. Indeed, the only other decision that has been found involving the use of state immunity testimony in any way in a federal prosecution is *United States* v. *Bonanno,* 178 F. Supp. 62 (S.D.N.Y. 1959). There, a motion by federal defendants to suppress the state immunity testimony of defendants and also of unindicted co-conspirators was denied, with the observation, however, that the prosecution intended to use only the testimony of the unindicted co-conspirators, and not the testimony of the defendants, and further that no question of the "fruit of the poisonous tree" was involved since there was no indication that the prosecution was going to use information which it had obtained as a result of the state immunity testimony (178 F. Supp. at p. 68, footnote 13).

Surely, the spectre of *Feldman*—and it is nothing more than that—is a slim basis upon which to destroy state immunity statutes. And surely, at the very least, the harm should not be anticipated and the Court should not reach out gratuitously to decide a constitutional question of such fundamental importance. The time to reach that question is *when and if* petitioners' testimony is sought to be used against them in a subsequent federal prosecution.

The Court accordingly should adhere to its previous decisions that a state immunity witness cannot refuse to testify upon the ground of federal incrimination.

C. If the Court should be of the view that petitioners must be protected against federal incrimination before their testimony may be compelled, then the Court should overrule *Feldman* which permits the use of state immunity testimony in a federal prosecution.

The spectre of *Feldman* overhangs this case. We believe that the Court should not vitiate state immunity statutes upon the basis of harm (a subsequent federal prosecution in which petitioners' state immunity testimony is used against them) which may not—and in overwhelming probability will not—ever occur. But if the Court believes that the Constitution requires that petitioners be protected against the possible harm ensuing from federal incrimination before petitioners' testimony may be compelled, then the Court should properly consider whether such harm may be constitutionally imposed at all. For certainly there is no necessity to nullify state immunity statutes if the harm feared can never permissibly eventuate. Compare, for example, those decisions holding that, upon proof that the statute of limitations has run on the crime in question, the witness may be compelled to give testimony that otherwise would be incriminatory. E.g., *Moore* v. *Backus,* 78 F. 2d 571, 577 (7th Cir. 1935).

Thus, if the Court believes that petitioners must be protected against federal self-incrimination before their testimony may be compelled, then the Court should hold in this case that the Fifth Amendment prohibits the use, directly or indirectly, of petitioners' testimony in any federal prosecution. Such a decision involves of course overruling *Feldman.*

Feldman involves a triad of interests—the interest of the States in the efficacy of their investigative powers; the interest of the state witness not to federally incriminate himself; and the interest of the Federal Government in the punishment of federal crimes. The most reasonable accommodation of these competing interests is to require the state witness to testify pursuant to the grant of state immunity but to prohibit the use of his immunity testimony, directly or indirectly, in any federal prosecution against him.

This accommodation is the most reasonable because it protects the state immunity witness and at the same time is consonant with the constitutional distribution of powers as between the States and the Nation. The state immunity witness is protected because his testimony cannot be used against him, directly or indirectly. This accommodation is consonant with the constitutional distribution of powers between the States and the Nation because the primary duty of enforcing criminal justice rests upon the States in our form of federalism. As this Court stated in *Knapp* v. *Schweitzer*, *supra*, 357 U. S. at page 375:

> "The essence of a constitutionally formulated federalism is the division of political and legal powers between two systems of government constituting a single Nation. The crucial difference between federalisms is a wide sweep of powers conferred upon the central government with a reservation of specific powers to the constituent units as against a particularization of powers granted to the federal government with the vast range of governmental powers left to the constituent units. The difference is strikingly illustrated by the British North America Act, 1867, 30 Vict., c. 3, and the Commonwealth of Australia Constitution Act, 1900, 63 & 64 Vict., c. 12. It is relevant to remind that our Constitution is one of particular powers given to the National Government with the powers not so delegated reserved to the States or, in the case of limitations upon both governments, to the people. Except insofar as penal remedies may be provided by Congress under the explicit authority to, make all Laws which shall be necessary and proper for carrying into Execution, the other powers granted by Art. I, § 8, the bulk of authority to legislate on what may be compendiously described as criminal justice, which in other nations belongs to the central government, is under our system the responsibility of the individual States."

Indeed, to nullify state immunity statutes so as not to interfere with the prosecution of federal crimes would be to reverse the distribution of powers as between the States and the Nation contemplated in the United States Constitution. Compare *Elkins* v. *United States*, 364 U. S. 206 (illegal state search and seizure evidence inadmissable in federal prosecution).

In *Elkins* v. *United States, supra,* 364 U. S. at page 222, it was stated: "[T]his Court has seldom shown itself unaware of the practical demands of effective criminal investigation and law enforcement." We respectfully call upon the Court to redeem the promise. We ask that the Court not render a decision in this case which would have the effect of nullifying the state immunity laws that are in existence throughout this country.

POINT III

Petitioners' other contentions respecting the within civil contempt judgments (that they were entitled to a jury trial; that they were entitled to a trial on the issue of their good faith; that they were entitled to know what information was contained in the Commission's files; and that they were denied the equal protection of the laws) are without merit.

1. Petitioners contend that, before they could be adjudged guilty of civil contempt, it was constitutionally required that they be given a jury trial. In *Green* v. *United States,* 356 U. S. 165, 183, sustaining a *federal criminal* contempt conviction in the absence of trial by jury, this Court stated: "The statements of this Court in a long and unbroken line of decisions involving contempts ranging from misbehavior in court to disobedience of court orders establish beyond peradventure that criminal contempts are not subject to jury trial as a matter of constitutional right." It accordingly cannot be reasonably contended that jury trials are constitutionally required in *state civil* contempts.

2. Petitioners contend that they were constitutionally entitled to a trial upon the issue of their good faith. Petitioners assert that "they had no contemptuous intent and that their resistance to the Waterfront Commission's interrogation was grounded in good faith upon valid legal

considerations" (petitioners' brief, p. 63). In other words petitioners claim that they cannot be compelled to testify unless it is first proven that they are possessed of some bad motive.

Petitioners' motives for refusing to testify are immaterial in a civil contempt proceeding. Thus, in *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187, this Court held that good faith is not a defense in a federal civil contempt proceeding for violation of an injunction order. Indeed, this Court has held in a criminal prosecution for contempt of Congress, pursuant to 2 U.S.C., § 192, which makes it a misdemeanor "wilfully" to refuse to answer questions or to produce papers, that good faith reliance upon advice of competent counsel was not a defense since moral turpitude was not involved and that the only question was whether the refusal to obey was deliberate, that is, not inadvertent. *Sinclair* v. *United States*, 279 U. S. 263, 299.

Here, of course, petitioners' continued refusal to testify is deliberate. Besides, petitioners, who are free on bond pending this Court's decision, may at any time purge themselves of civil contempt by testifying and it is difficult to see what good faith claim petitioners could make for continuing in their refusal to testify in the event this Court should decide that petitioners refused to testify without legal justification.

3. Petitioners (who are not licensed by the Commission) contend that they were denied due process in that they were unable to make a rational judgment with respect to the necessity or advisability of claiming the privilege against self-incrimination because of the "refusal of the Commission to apprise petitioners of the damaging information against them (if any) on the subject of supposed 'waterfront crime', the like refusal to allow confrontation in cross-examination of accusatory witnesses and the concomitant denial of all the petitioners' requests for discovery" (petitioners' brief, p. 75).

The court below stated respecting this argument: "We know of no rule, constitutional or otherwise, which provides that when, as here, the subject matter of the inquiry and the pertinency thereto of questions have been made clear to a witness, he is entitled to be given further information before deciding whether to exercise his privilege against self-incrimination. If the Commission were thus compelled to disclose the contents of its files, then the whole investigative process would be subject to scrutiny before the investigation had even gotten under way, and in most cases the investigation would be thwarted" (R. 238).

The reasoning of the court below on this question comports with this Court's decision in *Hannah* v. *Larche*, 363 U. S. 420, where the constitutional question involved was "Whether persons whose conduct is under investigation by a governmental agency of this nature [Civil Rights Commission] are entitled, by virtue of the Due Process Clause, to know the specific charges that are being investigated, as well as the identity of the complainants, and to have the right to cross-examine those complainants and other witnesses" (363 U. S. at pp. 441-2). The Court answered this question in the negative, stating that "the investigative process could be completely disrupted if investigative hearings were transformed into trial-like proceedings, and if persons who might be indirectly affected by an investigation were given an absolute right to cross-examine every witness called to testify". (363 U. S. at p. 443), and that, "We think it is fairly clear from this survey of various phases of governmental investigation that witnesses appearing before investigating agencies, whether legislative, executive, or judicial, have generally not been accorded the rights of apprisal, confrontation, or cross-examination" (363 U. S. at p. 449).

4. Finally, petitioners contend that they were discriminatorily denied, in violation of the equal protection of the laws, the benefits of the New Jersey Statute defining privi-

lege against self-incrimination to include federal crimes. The Court below held as a matter of general statutory construction that this statute, which was recently enacted in 1960, was not intended to be applicable in a situation where, as here, the witness had been granted immunity pursuant to the explicit immunity provisions of the Waterfront Commission Act. Since this decision involves a question of general statutory construction which will have uniform application, and is in no wise confined to petitioners, no question of the equal protection of the laws is presented. E.g., *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (New Jersey statute which makes holder of less than 5% of outstanding shares of corporation stock if unsuccessful in stockholder's derivative action liable for all expenses, including attorneys' fees, and requires security for their payment as a condition of prosecuting action, unless the stock has a market value in excess of $50,000 does not violate the equal protection of the laws). Moreover, contrary to petitioners' contentions, it is not at all clear that the same result would not obtain with respect to other New Jersey immunity statutes.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the civil contempt judgments herein should be affirmed in all respects.

Respectfully submitted,

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Dated: February, 1964.

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IN THE

Supreme Court of the United States

October Term, 1963

No. 138

WILLIAM MURPHY and JOHN MOODY, SR.,
Petitioners,

vs.

THE WATERFRONT COMMISSION OF
NEW YORK HARBOR,
Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF NATIONAL DISTRICT ATTORNEYS' ASSOCIATION, *AMICUS CURIAE*

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TABLE OF AUTHORITIES

Cases:

PAGE

Feldman v. United States, 322 U. S. 471 (1944) 15

Jack v. Kansas, 199 U. S. 372 (1905) 3, 4

Kings County District Attorney, Matter of, v. Powell (Kings Co. Ct. Nov. 13, 1963), aff'd —— App. Div. 2d ——, N. Y. L. Jour. Jan. 2, 1964, p. 14, col. 2 (2nd Dept. Dec. 30, 1963) leave to appeal denied (Desmond, C.J.) Jan. 23, 1964 11
Knapp v. Schweitzer, 357 U. S. 371 (1958) 3, 4, 13, 15

Malloy v. Hogan, No. 110, October Term, 1963 2, 15
Mapp v. Ohio, 367 U. S. 643 (1961) 15, 16
Mills v. Louisiana, 360 U. S. 230 (1959) 4, 15

People v. Cantor (Bronx Co. Ct. Apr. 29, 1963) 8
People v. Comparetti (Sup. Ct. N. Y. Co. Nov. 19, 1963) 13
People v. Corsover (N. Y. C. Crim. Ct. Nov. 3, 1961), aff'd 18 App. Div. 2d 1137 (1st Dept. 1963 15
People v. Damato (Gen. Sess. N. Y. Co. May 16, 1962) 6
People v. De Fillippo (Sup. Ct. N. Y. Co. Nov. 26, 1963) 13
People v. Dodge (Sup. Ct. N. Y. Co. Oct. 2, 1962) 5
People v. Freed (N. Y. C. Crim. Ct. Dec. 17, 1962) 12
People v. Gorlitzky (Sup. Ct. N. Y. Co. Oct. 17, 1962) 6
People v. Green (Gen. Sess. N. Y. Co. Nov. 27, 1961) 12
People v. Hacken (Gen. Sess. N. Y. Co. Feb. 7, 1962) 12
People v. Kanner (Sup. Ct. N. Y. Co. Dec. 20, 1963) 10
People v. Largever (Sup. Ct. N. Y. Co. Dec. 6, 1963) 10
People v. Litt (N. Y. C. Crim. Ct. March 15, 1963) 9
People v. Lobel (Sup. Ct. N. Y. Co. Jan. 31, 1964) 10
People v. Magliato (N. Y. C. Crim. Ct. Mar. 21, 1963) 13
People v. Mirrer (N. Y. C. Crim. Ct. June 21, 1963) 8

PAGE

People v. Molinas (Sup. Ct. N. Y. Co. Feb. 11, 1963) 12
People v. Pagan (N. Y. C. Crim. Ct. Feb. 17, 1963) 12
People v. Parkoff (Kings Co. Ct. Sept. 9, 1963) 8
People v. Pomeranz (Sup. Ct. N. Y. Co. Oct. 31, 1962) 6
People v. Powell (Kings Co. Ct. Sept. 6, 1963) 11
People v. Raphel (Bronx Co. Ct. May 28, 1963) 8
People v. Rehner (Queens Co. Ct. Jan. 19, 1962) 7
People v. Schert (Sup. Ct. N. Y. Co. Sept. 26, 1962 Indictment 2156-62) 7
People v. Siller (Sup. Ct. N. Y. Co. Dec. 6, 1963) 10
People v. Sparber (Gen. Sess. N. Y. Co. May 9, 1962) aff'd —— App. Div. 2d ——, N. Y. L. Jour., Feb. 19, 1964, p. 16, col. 3 (1st Dept. Feb. 18, 1964) 14
People v. Teichler (Bronx Co. Ct. May 13, 1963) 8
People v. Tripp (Spec. Sess. N. Y. C. Oct. 16, 1961) 12
People v. Tucker (Gen. Sess. N. Y. Co. Jan. 18, 1962) 12
People v. Wagman (Gen. Sess. N. Y. Co. Nov. 29, 1961) 12
People v. Weiner (Sup. Ct. N. Y. Co. Dec. 20, 1963) 10

Slagle v. Ohio, 366 U. S. 259 (1961) 4, 5

Wolf v. Colorado, 338 U. S. 25 (1948) 15

Statutes:

15 U. S. C.
  §1 7
  §68a 10
  §68b(a)(1) 10
  §68h 10

18 U. S. C.
  §2314 6
  §2315 6
  §1341 6
  §1342 6

	PAGE
§2315	7
§1343	10
§1010	11
§201	11
§1952	13
§1084	13
§1951	13
26 U. S. C.	
§7201	6
§7206	6
§7207	6
§7262	13
N. Y. Banking L. §357	13
N. Y. Penal L.	
§584	5
§2447(1), (2), (3c)	5
§581-a	7
§2051	8
§421	10
§439	11
§439(2)	11
§380	12
§381	12
§996	12
§382	12
§580	12
§1632	13
N. Y. Uncons. L. §§8581-8597	7, 8
N. Y. C. Admin. Code §B32-207.0	9

Other Authorities:

PAGE

United States Constitution
- Fifth Amendment 2
- Fourteenth Amendment 2

58 Am. Jur. Witnesses
- §36 3
- §51 4
- §89 4

Kroner, Self Incrimination:

The External Reach of the Privilege, 60 Col. L. Rev. 816, nn. 4-7 (1960) 3, 4

Note, 38 A. L. R. 2d 225 3, 4
Note, 82 A. L. R. 1380 4
Note, 59 A. L. R. 895 4

8 Wigmore, Evidence (McNaughton rev. 1961)
- §2252, n. 3 3
- §2258, n. 6 3, 4
- §2281 3

N. Y. Times:
- Oct. 3, 1962, p. 44, col. 3 6
- Nov. 1, 1962, p. 41, col. 7 6
- Oct. 18, 1962, p. 29, col. 4 6
- Oct. 4, 1961, p. 31, col. 5 6
- Aug. 6, 1961, p. 54, col. 3 7
- Jan. 20, 1962, p. 11, col. 6 7
- June 1, 1962, p. 1, col. 7 7
- Aug. 22, 1962, p. 1, col. 1 8
- Oct. 20, 1962, p. 28, col. 4 8
- Nov. 6, 1962, p. 67, col. 1 8
- Apr. 24, 1962, p. 34, col. 2 8
- Aug. 29, 1962, p. 31, col. 8 8
- Oct. 27, 1961, p. 17 9
- Nov. 2, 1961, p. 27 9

	PAGE
June 7, 1962, p. 70, col. 5	10
Oct. 13, 1961, p. 12	10
Oct. 18, 1963, p. 64, col. 1	10
Sept. 17, 1963, p. 48, col. 4	11
Dec. 18, 1962, p. 3, col. 1	12
Oct. 17, 1961, p. 27, col. 3	12
Apr. 18, 1961, p. 45, col. 1	12
May 20, 1960, p. 1, col. 3	12
Jan. 19, 1962, p. 41, col. 7	12
June 20, 1961, p. 1, col. 4	12
Nov. 28, 1961, p. 25, col. 5	12
Nov. 30, 1961, p. 49, col. 4	12
May 25, 1961, p. 1, col. 4	12
Feb. 8, 1962, p. 18, col. 1	12
May 18, 1962, p. 64, col. 1	13
Jan. 10, 1963, p. 16, col. 3	13
Feb. 12, 1963, p. 4, col. 6	13
Sept. 9, 1960, p. 59, col. 4	13
Oct. 21, 1960, p. 44, col. 6	13
May 9, 1962, p. 74, col. 7	14

IN THE

Supreme Court of the United States

October Term, 1963

No. 138

WILLIAM MURPHY and JOHN MOODY, SR.,

Petitioners,

vs.

THE WATERFRONT COMMISSION OF NEW YORK HARBOR,

Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF NATIONAL DISTRICT ATTORNEYS' ASSOCIATION, *AMICUS CURIAE*

Question Presented

May a witness in a state proceeding who receives immunity from prosecution by the state refuse to testify on grounds of possible incrimination under federal penal statutes?

Interest of *Amicus* and Summary of Argument

The National District Attorneys' Association is an interstate organization of local prosecutors, devoted to improving the quality of law enforcement in the states. On October 15, 1963, the Association, as *amicus curiae*, filed with this Court a brief in the case of *Malloy* v. *Hogan*, No. 110, October Term, 1963. *Malloy* raises the question whether due process [U.S. Const. Amend. XIV] obliges the states to afford witnesses in state proceedings a privilege that is equivalent to the privilege against self-incrimination of the Fifth Amendment. The Association's brief in *Malloy* concerned a matter not directly raised by the parties, possible implications of *Malloy* for state immunity statutes. We stated that whatever the Court's resolution of the question in *Malloy*, the effectiveness of state immunity statutes should remain unimpaired, because the two matters are distinct.

In the same week that the Association filed its brief in *Malloy*, this Court granted certiorari in the case at bar, and ordered oral argument immediately following the argument in *Malloy*. The Association supports the position of respondent in the instant case. Were petitioners' claim to prevail, and clear and controlling precedents thereby overruled, vital state prosecutions would be disastrously impaired. On the other hand, rejection of petitioners' claim, and reaffirmation of present law, entails no unfairness or prejudice to basic rights. This is demonstrated by the experience with state immunity statutes in a representative community, New York City, since this Court's last pronouncement on the issue.

ARGUMENT

The court should preserve the effectiveness of state immunity statutes by reaffirming its previous holdings that a witness in a state proceeding who receives immunity from prosecution by the state may not refuse to testify on grounds of possible incrimination under federal criminal statutes.

(a) The present rule as to self-incrimination in a federal system

A privilege against self-incrimination is contained in the constitutions of forty-eight states, and in the statutes or common law of the remaining two [see 8 Wigmore, EVIDENCE §2252, n. 3 (McNaughton rev. 1961); 58 AM. JUR., *Witnesses* §36; Kroner, *Self Incrimination: The External Reach of the Privilege*, 60 COL. L. REV. 816, nn. 4-7 (1960)]. To protect these privileges without sacrificing urgent investigations of crime, every state has passed statutes that grant immunity from prosecution for any state crime revealed by a witness, in exchange for the witness's testimony [see Wigmore, *supra*, §2281, n. 11]. State courts have consistently held that by precluding prosecution by the state, an "immunity statute" effectively supplants the privilege against self-incrimination [see Wigmore, *supra*, §2281; Note, 38 A. L. R. 2d 225].

A state is powerless, however, to give witnesses immunity from prosecution beyond its jurisdiction—in federal courts, or in other states [*Knapp* v. *Schweitzer*, 357 U. S. 371 (1958); *Jack* v. *Kansas*, 199 U. S. 372 (1905)]. While there are few state decisions directly concerning the power of a state to compel testimony that may incriminate under the laws of another state, many state courts have passed upon claims of possible incrimination under federal laws. In the latter cases, the state's power to compel testimony is generally upheld [see Wigmore, *supra,* §2258, n. 6; Kroner, *op. cit. supra,* pp. 827-835; 58 Am. Jur., *Witnesses,* §§51, 89; Notes, 38 A. L. R. 2d 225; 82 A. L. R. 1380; 59 A. L. R. 895].

This situation first came before the Supreme Court in *Jack* v. *Kansas, supra.* Jack, a witness in a state investigation of violations of the state anti-trust act, refused to answer questions under a grant of immunity, and alleged possible incrimination under federal anti-trust laws. His conviction for contempt was upheld by this Court, over his claim of deprivation of due process under the Fourteenth Amendment. The principle was reasserted in *Knapp* v. *Schweitzer, supra.* In that case, an employer in a business in interstate commerce refused to testify in a state grand jury investigation of labor corruption, despite a grant of immunity, on the ground that the state did not protect him against federal prosecution under the National Labor-Management Relations Act of 1947. *Knapp* v. *Schweitzer* has since been reaffirmed [see *Mills* v. *Louisiana,* 360 U. S. 230 (1959); *Slagle* v. *Ohio,* 366 U. S. 259 (1961)].

(b) Experience in one community under the present rule

The grant of the instant writ of certiorari implies a reexamination of these decisions. Their primary basis, it may be recalled, was the "historic distribution of power as between Nation and States in our federal system" [see

Knapp v. *Schweitzer, supra* at 375]. In the opinion of a majority of this Court, to accept a state witness's claim of possible incrimination under federal statutes, in "these days of the extensive sweep of such federal statutes as the income tax law," would be largely "to withdraw from the states their traditional power to investigate in aid of prosecuting conventional state crimes" [*id.* at 375-375, 378-379].

This reasoning is utterly confirmed by the following review of the use of immunity statutes in criminal proceedings in one community, New York City, in the two-and-one-half years since the last of these decisions was rendered [see *Slagle* v. *Ohio, supra*]. The five counties of New York City, with their mercantile, financial, industrial, political and residential complexes, provide fitting examples of the problems of law enforcement faced in communities across the country. The discussion includes all or substantially all reasonably discoverable cases in which criminal convictions were obtained through use of immunity statutes, and federal penal laws touched the field of inquiry.

Commercial larceny

During the time in question, several important larceny cases were solved in New York City with grants of immunity. A New York County grand jury investigated a sensational theft of $1,370,000 in securities from the New York office of Bache & Co., a nationwide firm of stockbrokers. Immunity was given to an accomplice in the plot, pursuant to a statutory authorization for immunity to witnesses in investigations of criminal conspiracies [see N. Y. PENAL L. §584] and a general provision for immunity before grand juries [see N. Y. Penal L. §2447(1), (2), (3c)]. As a result of the inquiry, almost all the stolen stock was recovered, two of the principals pleaded guilty to larceny charges [*People* v. *Dodge* (Sup. Ct. N. Y. Co., Oct. 2, 1962), in N. Y. Times, Oct. 3, 1962, p. 44, col. 3; *People* v. *Pomeranz* (Sup. Ct. N. Y. Co., Oct. 31, 1962), in N. Y. Times, Nov. 1, 1962, p. 41, col. 7], and the third was found guilty of forgery after trial [*People* v. *Gorlitzky* (Sup. Ct. N. Y. Co., Oct. 17, 1962), *appeal pending;* in N. Y. Times, Oct. 18, 1962, p. 29, col. 4]. A successful claim by the immunized witness of possible incrimination under federal statutes would have prevented these results; because of the elaborate plans for the disposal of the stocks in interstate commerce, the witness implicated herself under federal statutes relating to transportation and disposal of stolen and forged securities [see 18 U. S. C. §§2314, 2315], and might also have claimed incrimination under federal income tax laws [see 26 U. S. C. §§7201, 7206, 7207].

In an analogous case, a New York County grand jury investigating a theft of $250,000 in stocks granted immunity to an accomplice of the two suspects, who subsequently were indicted and pleaded guilty [*People* v. *Damato* (Gen. Sess. N. Y. Co. May 16, 1962), in N. Y. Times, Oct. 4, 1961, p. 31, col. 5]. The witness had participated in the defendants' scheme to forge endorsements on the stolen securities, and dispose of the stocks by setting up, through use of the mails, brokerage accounts in fictitious names. Thus, the investigation would have been obstructed if the witness had been able to invoke the federal laws prohibiting use of the mails to defraud [see 18 U. S. C. §1341], fraudulent use of a fictitious name or address in mailed correspondence [see 18 U. S. C. §1342], disposal of stolen or forged securities, and income tax evasion.

In a similar case, checks worth $61,540 were stolen from the mail of a Manhattan financial firm. In the ensuing grand jury investigation, three co-conspirators received immunity. The plan that was uncovered involved forging endorsements on the stolen checks, and depositing the checks in false bank accounts. The two defendants later pleaded guilty to various charges [*People* v. *Scherl* (Sup. Ct. N. Y. Co. Sept. 26, 1962; Indictment 2156-62)]. Associated federal laws included statutes relating to mail theft, receipt of stolen mail [see 18 U. S. C. §1708], receipt and disposal of checks stolen in interstate commerce, receipt and disposal of forged checks [see 18 U. S. C. §2315], and tax evasion.

Fraud in public works and housing

Prosecutions for major crimes against public agencies have provided another setting for the conferral of immunity. A scheme by several plumbing contractors to rig bids on school construction contracts [see N. Y. Penal L. §581-a], which cost the taxpayers an estimated $250,000, was uncovered with the help of grants of immunity to a co-conspirator and several employees. These essential witnesses might have thwarted the inquiry by citing federal statutes prohibiting restraint of trade [see 15 U. S. C. §1] or evasion of income taxes. The six defendants pleaded guilty, and the city received substantial restitution [*People* v. *Rehner* (Queens Co. Ct. Jan. 19, 1962), in N. Y. Times, Aug. 6, 1961, p. 54, col. 3; *id.*, Jan. 20, 1962, p. 11, col. 6; *id.*, June 1, 1962, p. 1, col. 7].

Devices by landlords to evade local rent control laws [see N. Y. UNCONS. L. §§8581-8597] were also prosecuted successfully by grants of immunity. The basic scheme was fraudulently to obtain from the public Commission that administered the rent control program certain orders permitting rent increases, by submitting to the Commission false invoices from contractors representing that various improvements had been performed on the premises. The orders were then mailed to the tenants, who paid the landlords increased rents. In one investigation, a contractor's employee, who received immunity, described how the contractor had prepared two sets of bills, one for contracts performed, the other for fictitious work. Seven landlords, suppliers and employees were convicted, on pleas of guilty, under indictments alleging perjury, grand larceny, submission of false applications [see N. Y. UNCONS. L. §8591; N. Y. PENAL L. §2051], and related crimes [*People* v. *Cantor* (Bronx Co. Ct. Apr. 29, 1963); *People* v. *Teichler* (Bronx Co. Ct. May 13, 1963); *People* v. *Raphel* (Bronx Co. Ct. May 28, 1963); in N. Y. Times, Aug. 22, 1962, p. 1, col. 1; *id.*, Oct. 20, 1962, p. 28, col. 4]. Similar convictions were obtained through grants of immunity to a contractor [*People* v. *Parkoff* (Kings Co. Ct. Sept. 9, 1963), in N. Y. Times, Nov. 6, 1962, p. 67, col. 1] and a landlord [*People* v. *Mirrer* (N. Y. C. Crim. Ct. June 21, 1963), in N. Y. Times, Apr. 24, 1962, p. 34, col. 2]. As a result of these city-wide investigations, countless tenants obtained deserved reductions in rents [see N. Y. Times, Aug. 29, 1962, p. 31, col. 8]. Again, federal income tax laws, as well as statutes concerning use of the mails to defraud, might have been cited by the witnesses.

Consumer frauds

The versatility of state immunity statutes, and the breadth of federal jurisdiction, are also illustrated by two recent investigations of fraudulent trade practices in the retail clothing industry. In June, 1962, after an extensive inquiry, a grand jury uncovered a clever scheme to make "going out of business" a profitable business. A quality men's clothing chain, long established in the community, applied for a license to run a "going out of business sale" in connection with the closing of its stores. As local law required, the proprietors prepared a sworn application for a license to conduct the sale [see N. Y. C. ADMIN. CODE §B32-207.0]. To show that the merchandise to be offered for sale was their regular inventory, not goods purchased especially for the sale, the merchants submitted to the New York City Department of Licenses invoices and letters obtained from clothing manufacturers, representing that the purchases had occurred months before the sale was contemplated, and indicating that the clothing was of the customary high quality. The license was issued, and the store unleashed a barrage of enticing advertising by radio, mail and newspapers [*cf.* N. Y. Times, Oct. 27, 1961, p. 17; *id.*, Nov. 2, 1961, p. 27], suggesting that because the stores were closing, regular inventory was now available at greatly reduced prices. In the shops, tags on the closing showed that the "original" prices had been drastically cut. The sale grossed over $1,000,000. In the grand jury, the clothing manufacturers, testifying under immunity, revealed that they had falsely pre-dated the orders, that clothing sold for $800,000 was purchased just before the sale, and that in many instances the merchandise constituted cheap goods below the store's regular standards. Two other witnesses testified under immunity that the retailers had engaged them to obtain the license, purchase the clothing, and promote the sale. The merchants subsequently pleaded guilty to appropriate charges, a high official of the Department of Licenses was dismissed in connection with the case, and licensing procedures were revamped [*People* v. *Litt* (N. Y. C. Crim. Ct. March 15, 1963), in N. Y. Times, June 7, 1962, p. 70, col. 5]. The exposure of the scheme, and protection of the New York consumer, would have been blocked had the manufacturers and promoters been able to remain silent—a likely result under the instant petitioners' contention, in view of federal statutes concerning deceptive labeling of wool products [see 15 U. S. C. §§68a, 68b(a)(1), 68h], using radio in a scheme to defraud or obtain money by false promise [see 18 U. S. C. §1343], use of the mails to defraud, and income tax evasion.

Because of the same federal statutes, an investigation under the false advertising statute [see N. Y. Penal L. §421] of the advertising of a large New York department store, S. Klein, also would have been fruitless if petitioners' view had been law. Dramatic advertisements in major New York newspapers represented that Klein's had purchased clothing from a "renowned clothier," and was selling the goods at reduced prices with the clothier's "famous label" [*cf.* N. Y. Times, Oct. 13, 1961, p. 12]. Through grants of immunity to the clothiers and other witnesses, it was established that most of the goods in the sale had been purchased by Klein's buyers directly from the manufacturers, who shipped them to Klein's, and that the clothing was largely of inferior quality. Several manufacturers were subsequently convicted of perjury, on their pleas of guilty, for falsely telling the grand jury that they had sold the goods to the clothiers, not to Klein's, and the scheme was exposed to the public [*People* v. *Largever, People* v. *Siller* (Sup. Ct. N. Y. Co. Dec. 6, 1963); *People* v. *Weiner, People* v. *Kanner* (Sup. Ct. N. Y. Co. Dec. 20, 1963); *People* v. *Lobel* (Sup. Ct. N. Y. Co. Jan. 31, 1964); in N. Y. Times, Oct. 18, 1963, p. 64, col. 1].

Protection of local consumers was again afforded by an investigation of fraudulent sales of houses, in which the promoters duped numerous purchasers with false evidence of compliance with local housing codes. Complaints of buyers whose houses had become uninhabitable, and a grant of immunity to a contractor, led to the conviction, after trial, of a major promoter for grand larceny [*People* v. *Powell* (Kings Co. Ct. Sept. 6, 1963), in N. Y. Times, Sept. 7, 1963, p. 48, col. 4]. Federal statutes in this area included the prohibitions against submitting false statements to the Federal Housing Administration to obtain credit [see 18 U. S. C. §1010], and evasion of income taxes.*

---

* After judgment, the defendant received immunity in return for his testimony in a grand jury inquiry into apparent widespread bribery of building inspectors and other officials. His subsequent refusal to testify on grounds of incrimination under the federal housing and bribery statutes [see 18 U. S. C. §§201, 1010] resulted in his conviction for contempt, but has blocked a significant investigation. *Amicus* is informed that the defendant is now in the process of petitioning this Court for a review of the contempt proceedings [*Matter of Kings County District Attorney* v. *Powell* (Kings Co. Ct. Nov. 13, 1963), *aff'd* —— App. Div. 2d ——, N. Y. L. Jour. Jan 2, 1964, p. 14, col. 2 (2nd Dept. Dec. 30, 1963), *leave to appeal denied* (DESMOND, C.J.) Jan. 23, 1964].

Commercial bribery

Still another crime, corruption of employees to influence their conduct in relation to their employer's business [see N. Y. Penal L. §439], commonly known as "commercial bribery," has been prosecuted with the help of immunity, which is specifically authorized in such cases [N. Y. Penal L. §439(2)]. Two officers of a prominent charitable organization, the Muscular Dystrophy Association, were convicted, on their pleas of guilty, of accepting sizeable kickbacks from a printer, for favoring the printer with the charity's extensive printing contracts. A grant of immunity to the printer enabled the prosecution, and the ensuing protection to the organization's contributors and beneficiaries [*People* v. *Pagan* (N. Y. C. Crim. Ct. Feb. 17, 1963)]. An extensive investigation of "payola" to New York disc jockeys, several of whom pleaded guilty or were convicted after trial, also involved grants of immunity to the payers, manufacturers and distributors of phonograph records [*People* v. *Freed* (N. Y. C. Crim. Ct. Dec. 17, 1962), in N. Y. Times, Dec. 18, 1962, p. 3, col. 1; *People* v. *Tripp* (Spec. Sess. N. Y. C. Oct. 16, 1961), in N. Y. Times, Oct. 17, 1961, p. 27, col. 3; *id.*, Apr. 18, 1961, p. 45, col. 1; *id.*, May 20, 1960, p. 1, col. 3]. If the witnesses who received immunity in these cases of commercial bribery could have refused to testify on grounds of implication under federal tax laws, the benefits of these investigations would have been needlessly lost.

Gambling and racketeering

Immunity is often conferred as a necessary aspect of investigations of gambling, racketeering and official corruption [see N. Y. Penal L. §§380, 381, 996]. Widespread fixing of college basketball games by gamblers was exposed in an exhaustive inquiry, involving twenty-five colleges across the country, and forty-nine players. Several defendants pleaded guilty of charges of conspiracy, to bribe, and bribery of, participants in sports [*People* v. *Tucker* (Gen. Sess. N. Y. Co. Jan. 18, 1962), in N. Y. Times, Jan. 19, 1962, p. 41, col. 7; *People* v. *Green* (Gen. Sess. N. Y. Co. Nov. 27, 1961), in N. Y. Times, June 20, 1961, p. 1, col. 4; *id.*, Nov. 28, 1961, p. 25, col. 5; *People* v. *Wagman* (Gen. Sess. N. Y. Co. Nov. 29, 1961), in N. Y. Times, Nov. 30, 1961, p. 49, col. 4; *People* v. *Hacken* (Gen. Sess. N. Y. Co. Feb. 7, 1962), in N. Y. Times, May 25, 1961, p. 1, col. 4; *id.*, Feb. 8, 1962, p. 18, col. 1; see N. Y. PENAL L. §§382, 580], and another was convicted after trial [*People* v. *Molinas* (Sup. Ct. N. Y. Co. Feb. 11, 1963), *appeal pending;* in N. Y. Times, May 18, 1962, p. 64, col. 1; *id.*, Jan. 10, 1963, p. 16, col. 3; *id.*, Feb. 12, 1963, p. 4, col. 6]. The prosecutions would have been impossible without grants of immunity to the numerous players, and to one of the gamblers. If the instant petitioners were correct, these witnesses could have disrupted the investigation by claiming risk of incrimination under the pervasive federal laws concerning income tax evasion, and traveling in or using facilities in interstate commerce to carry on or distribute proceeds of a gambling enterprise [see 18 U. S. C. §§1952, 1084].

A protracted investigation of a loan shark racket in the New York City garment center [see N. Y. Times, Sept. 9, 1960, p. 59, col. 4; *id.*, Oct. 21, 1960, p. 44, col. 6] led to convictions for extortion [*People* v. *DeFillippo* (Sup. Ct. N. Y. Co. Nov. 26, 1963); *People* v. *Comparetti* (Sup. Ct. N. Y.

Co. Nov. 19, 1963)] and usury [*People* v. *Magliato* (N. Y. C. Crim. Ct. Mar. 21, 1963); see N. Y. BANKING L. §357]. A grant of immunity to the defendants' accountant enabled the latter prosecution. This witness could have asserted possible incrimination under federal tax evasion laws, and perhaps even under the broad statute that forbids affecting interstate commerce by extortion [see 18 U. S. C. §1951].

Professional misconduct

The soundness of the rationale of *Knapp* v. *Schweitzer, supra,* is further demonstrated by such diverse cases as a prosecution of a New York negligence attorney for suborning witnesses at a disciplinary inquiry into his practice. He had obtained insurance benefits for numerous clients by submitting false claims of injury, and supporting the claims with bogus medical reports from doctors with whom he had connived. He then induced the clients and a doctor to lie at the disciplinary hearing. His conviction for subornation would have been impossible without grants of immunity to the doctor and clients, all of whom could have claimed incrimination under federal income tax laws [*People* v. *Sparber* (Gen. Sess. N. Y. Co. May 9, 1962), *aff'd* —— App. Div. 2d ——, N. Y. L. JOUR., Feb. 19, 1964, p. 16, col. 3 (1st Dept. Feb. 18, 1964), in N. Y. Times, May 9, 1962, p. 74, col. 7]. The same may be said of the prosecution of another negligence attorney for ambulance chasing [see N. Y. PENAL L. §270-a]. In this case, one of many arising from investigations of the automobile towing business [see N. Y. Times, Feb. 8, 1961, p. 22, col. 3; *id.*, April 13, 1961, p. 28, col. 3], the operator of a towing truck testified under immunity that the defendant had hired him to make on-the-spot referrals of victims of traffic accidents, in return for a percentage of the attorney's fees [*People* v. *Corsover* (N. Y. C. Crim. Ct. Nov. 3, 1961), *aff'd* 18 App. Div. 2d 1137 (1st Dept. 1963), *leave to appeal denied* (FULD, J.) May 21, 1963; in N. Y. Times, Sept. 29, 1961, p. 26, col. 8; *id.*, Sept. 30, 1961, p. 26, col. 1; *id.*, Oct. 7, 1961, p. 14, col. 7; *id.*, Nov. 4, 1961, p. 6, col. 5].

(c) The reasonableness of the present rule

In each of these cases, immunity from prosecution was conferred as an essential element of responsible law enforcement. While in every instance federal criminal statutes touched the field of inquiry, this was due to the remarkable breadth and comprehensiveness of federal statutes; the prosecutions involved primarily local matters, and could not reasonably have been delegated to federal agencies. The review also indicates that the state prosecutions where a federal law overlaps are usually major cases, in which the public interest would be seriously prejudiced by a refusal to testify. Against this background of public concern, it is absurd to contend, as petitioners do (brief, p. 47), that a "simple" solution to the issues at bar is the abandonment by the state of its investigations.

Petitioners' view is further refuted by the subsequent history of the cases discussed above. There is no record of criminal prosecution by the federal government of any of the witnesses who received immunity in these investigations. Although in *Feldman* v. *United States* [322 U. S. 471 (1944)] this Court held, in a 4-3 decision, that self-incriminating testimony compelled under a state immunity statute is admissible at a federal criminal trial, apparently the *Feldman* decision has been used sparingly by federal prosecutors.

Moreover, as has been suggested by several members of this Court [see *Knapp* v. *Schweitzer,* 357 U. S. 371, 381, 382, 384 (1958); *Mills* v. *Louisiana,* 360 U. S. 230-231, 233-234, 238-239 (1959)], the Association in its *amicus* brief in *Malloy* v. *Hogan,* and the Attorney General of the State of New York, *amicus curiae* in the instant case, *Feldman* can properly be overruled. Not only may the state-compelled testimony be excluded from federal court, but if the witness is prosecuted in a federal court, a hearing may be held there to determine whether the government's evidence includes "fruits" of the testimony (see brief of N. Y. Att'y Gen.). In short, the equivocal holding of *Feldman* should not be considered a bar to valuable state investigations.

Thus, experiences with the rule of *Knapp* v. *Schweitzer* establish its necessity to vital public interests, the absence in the past of undue prejudice from its application, and the availability in the future of convenient measures for eliminating the risk of its abuse. A comparison with the decisions of this Court in the field of search and seizure is suggested. In *Mapp* v. *Ohio* [367 U. S. 643 (1961)], to determine whether the established right of a citizen of a state to be free from unreasonable searches and seizures [see *Wolf* v. *Colorado,* 338 U. S. 25 (1948)] required exclusion from evidence in a state court of material obtained by an unreasonable search, this Court reviewed the experience in the states under the previous rule. Each of the considerations reviewed in *Mapp* supports the existing law as to state immunity statutes. First, in *Mapp,* the Court found widespread abuse of substantial rights under the existing rule. But the situation is otherwise here, because federal use of the state-compelled testimony is rare. Secondly, in *Mapp* the remedies available to the citizen, such as civil suits for trespass, were found inadequate to preserve his rights; their deterrent effect on lawless law enforcement was slight. Here, with the state procedures lawful, there is no improper state action to deter. In addition, an effective remedy to possible harm can be afforded the witness in the few situations where a remedy is necessary: exclusion of his testimony and its fruits from federal courts. Finally, in *Mapp* the Court referred to an alternative available to the state; in many cases, through greater diligence and expense, the state authorities could preserve the investigation by obtaining a warrant or otherwise justifying the search. In the instant situation, the state gives the witness every protection within its power. Since the witness's testimony is usually essential to the prosecution, there is no alternative, except abandonment of an important inquiry.

In sum, this case places on the scales a speculative, intangible risk to the witness—one easily avoidable through appropriate remedies—and certain, substantial injury to the public. Proper balancing of these interests forbids premature acceptance of the witness's claim, in the context of the state investigation; the claim should be deferred until it can be judged in the proper setting, a federal prosecution.

CONCLUSION

The judgment below should be affirmed, and this Court's holdings—that a witness in a state proceeding who receives immunity from prosecution by the state may not refuse to testify on grounds of possible incrimination under federal statutes—should be reaffirmed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1963

No. 138

WILLIAM MURPHY and JOHN MOODY, SR.,
Petitioners,
against
THE WATERFRONT COMMISSION OF
NEW YORK HARBOR,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF NEW JERSEY

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, AS *AMICUS CURIAE*, IN SUPPORT OF RESPONDENT

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INDEX

PAGE

Interest of the *Amicus* 1

Statement of the Case 3

Statutes and Constitutional Provisiions Involved 4

Questions Presented 5

Summary of Argument 6

ARGUMENT 9

Point I—Assuming that the privilege against self-incrimination would be violated by the use against an individual, in a federal prosecution, of evidence obtained pursuant to a grant to him of state immunity,, the states should not be barred from penalizing persons who refuse to testify despite having been granted immunity from state prosecution 9

A. The likelihood of federal prosecution or conviction on the basis of evidence obtained through a state grant of immunity is extremely remote 10

B. Adequate means are available to the federal courts to prevent use against an individual, in a federal prosecution, of evidence obtained through state-compelled testimony. It is not necessary, therefore, to invalidate state immunity statutes 12

Point II—Even assuming that the Fifth Amendment privilege against self-incrimination extends to the states through the Fourteenth Amendment, one who is granted immunity in a state inquiry may not refuse to testify as to matters which might incriminate him under the laws of a different sovereignty, particularly where there is only a very remote possibility of the other sovereignty using his testimony against him 15

PAGE

A. A privilege against self-incrimination should not be recognized where the person claiming its protection faces only a remote possibility of prosecution on the basis of the testimony sought to be elicited from him 16

B. Since the purpose of the privilege against self-incrimination is to deter abuses by a government in the enforcement of its own criminal laws, it should not be construed to provide protection against possible prosecution under the laws of another sovereignty 18

POINT III—The Fifth Amendment privilege against self-incrimination should not be regarded as a fundamental and absolute right to refuse to respond to orderly state inquiry, at least where the state is not seeking to enforce its own criminal laws against the individual whose testimony it requests 22

Conclusion 25

Appendix 26

CASES

Abbate v. *United States*, 359 U. S. 187 (1959) 25

Adamson v. *California*, 332 U. S. 46 (1947) 22, 23

Amana Society v. *Selzer*, 250 Iowa 380, 94 N. W. 2d 337 (1959) 2

Ballman v. *Fagin*, 200 U. S. 186 (1906) 19, 20, 21

Bridges v. *California*, 314 U. S. 252 (1941) 24

Bram v. *United States*, 168 U. S. 532 (1897) 11

Brown v. *Mississippi*, 297 U. S. 278 (1936) 12

Brown v. *Walker*, 161 U. S. 591 (1896) 17

Bruno v. *United States*, 308 U. S. 287 (1939) 23

Elkins v. *United States*, 364 U. S. 206 (1960) 6, 11

PAGE

Emspak v. *United States*, 349 U. S. 190 (1955) 23

Feldman v. *United States*, 322 U. S. 487 (1944) 6, 9, 10, 11, 14

Gitlow v. *New York*, 268 U. S. 652 (1925) 24

Hale v. *Henkel*, 201 U. S. 43 (1906) 17, 21

Hamilton v. *Regents*, 293 U. S. 245 (1934) 24

Haynes v. *Washington*, 373 U. S. 503 (1963) 23

Hoffman v. *United States*, 341 U. S. 477 (1955) 16, 23

In re Pillo, 11 N. J. 8, 93 A. 2d 176 (1952) 16

In re Watson, 293 Mich. 263, 291 N. W. 652 (1940) .. 17

Jack v. *Kansas*, 199 U. S. 372 (1905) 17, 21

Knapp v. *Schweitzer*, 357 U. S. 371 (1957) 9, 10, 21, 22

Malloy v. *Hogan*, 150 Conn. 520, 187 A. 2d 744, *cert. granted* 373 U. S. 948 (1963), No. 110, Oct. T. 1963 .... 7, 15

Marcello v. *United States*, 196 F. 2d 437 (5th Cir. 1952) 21

Mason v. *United States*, 244 U. S. 362 (1917) 16, 23

Mills v. *Louisiana*, 360 U. S. 230 (1958) 9, 10, 12, 14, 21

Nardone v. *United States*, 308 U. S. 338 (1939) 12, 13

Palko v. *Connecticut*, 302 U. S. 318 (1937) 22

People v. *Den Uyl*, 318 Mich. 645, 29 N. W. 2d 284 (1947) 17

Poe v. *Ullman*, 367 U. S. 497 (1961) 12

Richter v. *United States*, 181 F. 2d 591 (9th Cir. 1950), *cert. denied*, 340 U. S. 892 (1952) 24

Rogers v. *Richmond*, 365 U. S. 534 (1961) 23

Schenck v. *United States*, 249 U. S. 47, 52 (1919) 24

Shotwell Mfg. Co. v. *United States*, 371 U. S. 341 (1963) 11

PAGE

Silverthorne Lumber Co. v. *United States*, 251 U. S. 385 (1919) 12

Smith v. *United States*, 268 F. 2d 416 (9th Cir., 1959) 23

Snyder v. *Massachusetts*, 291 U. S. 97. (1934) 22

State v. *Dominguez*, 228 La. 284, 82 So. 2d 12 (1955) 17

State v. *Ford*, 233 La. 992, 99 So. 2d 320 (1958) 17

State v. *White*, 27 N. J. 158, 142 A. 2d 65 (1958) 2

Tedesco v. *United States*, 255 F. 2d 35 (6th Cir., 1958) 21

Twining v. *New Jersey*, 211 U. S. 78 (1908) 22, 23

United States v. *Bonanno*, 178 F. Supp. 62 (S.D.N.Y., 1959) 14

United States v. *Hutcheson*, 369 U. S. 599 (1962) .. 20

United States v. *Murdock*, 284 U. S. 141 (1931) 21

United States v. *Saline Bank*, 26 U. S. (1 Pet.) 100 (1828) 19, 20

United States v. *Ullmann*, 350 U. S. 422 (1956) 17

Uphaus v. *Wyman*, 360 U. S. 72 (1959) 24

Wan v. *United States*, 266 U. S. 1 (1924) 11

West Virginia State Board of Education v. *Barnette*, 319 U. S. 624 (1943) 24

STATUTES AND CONSTITUTIONAL PROVISIONS

Constitution of the United States:

AMENDMENT I 22

AMENDMENT IV 22

AMENDMENT V 3, 4, 5, 23, 24

AMENDMENT VI 22

AMENDMENT XIV 5, 15, 18, 22, 23

Federal Statute:

67 Stat. 541, Act of Aug. 12, 1953, c. 407 4

PAGE

New Jersey Statutes Annotated:
- 2A:81-5 2
- 32:23-1 4
- 32:23-70 4
- 32:23-86(5) 3

New York Statutes:
- McKinney's Unconsolidated Laws, §§ 9801 *et seq.* 4
- Penal Law, § 2447 4

MISCELLANEOUS

Kroner, *Self-Incrimination: The External Reach of the Privilege,* 60 Col. L. Rev. 816 (1960) 19

McNaughton, *Self-Incrimination Under Foreign Law,* 45 Va. L. Rev. 1299 (1959) 19

Rule 41(e), Federal Rules of Criminal Procedure 12

Rule 48, Revised Rules of the Supreme Court of the United States 3

8 Wigmore, EVIDENCE (McNaughton rev. 1961):
- § 2250 20
- § 2251 .... 18, 19
- § 2252 2
- § 2258 19
- § 2272 16
- § 2281 2

Supreme Court of the United States

OCTOBER TERM, 1963

No. 138

William Murphy and John Moody, Sr.,
Petitioners,
against
The Waterfront Commission of New York Harbor,
Respondent.

On Writ of Certiorari to the
Supreme Court of New Jersey

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, AS *AMICUS CURIAE*, IN SUPPORT OF RESPONDENT

Interest of the *Amicus*

The granting of certiorari in this case brings into question the constitutional validity of state immunity statutes. These statutes—such as the one under attack in the instant case—provide for appropriate sanctions where an individual refuses to testify before a state investigative body despite having been granted immunity, pursuant to such a statute, from state criminal prosecution based upon matter elicited through his testimony.

The immunity statutes have come into being as the states have sought to respect the privileges against self-incrimination contained in their own constitutions, statutes and common law,* while still maintaining their responsibilities for law enforcement. Every one of the fifty states has such statutes on its books,** and these play a vitally important role in the states' efforts to investigate crime and to enforce their own criminal laws.

The statutes are frequently employed by grand juries, legislative committees, and special crime investigating commissions. By granting a single individual immunity from prosecution, state investigative bodies have been able to obtain valuable information leading to the conviction of others—information which would otherwise be extremely difficult, if not impossible, to obtain. See, *e.g.*, Brief of the National District Attorneys' Association, *Amicus Curiae*, in the instant case, pp. 5-14. Even when it does not lead directly to the conviction of others, such information can be a valuable guide to legislators, as well as to law enforcement officials, in their efforts to combat crime.

A reversal of the convictions in the instant case—at least if made on the ground that the immunity conferred on petitioners was insufficient because it did not protect them from possible incrimination under federal law—

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* The privilege against self-incrimination is included expressly in the constitutions of every state except Iowa and New Jersey. Iowa considers the privilege as within the scope of its due process clause (see *Amana Society* v. *Selzer*, 250 Iowa 380, 383-84, 94 N. W. 2d 337, 339 [1959]), while the privilege is provided for by statute in New Jersey (N.J.S.A. 2A:81-5; *State* v. *White*, 27 N. J. 158, 168-69, 142 A. 2d 65, 70 [1958]). See 8 Wigmore, EVIDENCE § 2252 (McNaughton rev. 1961).

** An exhaustive list of immunity statutes is set forth in 8 Wigmore, EVIDENCE § 2281 n 11 (McNaughton rev. 1961).

could very well mean that, as a practical matter, the states would be deprived of a very valuable means of investigating and protecting against criminal activity.

Concerned over the viability of state immunity statutes, and convinced that the protection against self incrimination afforded by the Fifth Amendment of the Constitution will not be infringed by an affirmance of the convictions in this case, we file this brief in support of respondents, pursuant to Rule 42 of the Rules of this Court.

Statement of the Case

Petitioners Murphy and Moody seek reversal of their convictions for civil contempt. The convictions resulted from petitioners' refusal, on October 27, 1961, to testify before the Waterfront Commission of New York Harbor —despite having been granted immunity, pursuant to N.J.S.A. 32:23-86(5), against prosecution in the States of New York and New Jersey concerning any transaction to which they would testify—on the ground that their answers might tend to incriminate them (R. 58-83). In particular, petitioners refused to answer the questions propounded to them on the ground that the Commission's grant of immunity could not protect them from federal prosecution (R. 58, 59, 72).

Upon petitioners' refusal to answer the questions despite the grant of immunity, the Waterfront Commission instituted contempt proceedings against them in the Superior Court of New Jersey, Hudson County. That Court, in judgments filed December 4, 1961, found petitioners guilty of both criminal and civil contempt, fined them $50 and sentenced them to 30 days in jail, and further ordered that they remain incarcerated until they answered certain questions listed in the judgments (R. 176-183). On appeal, the Supreme Court of New Jersey, in an opinion by Judge PROCTOR dated March 4, 1963, unanimously affirmed the convictions for civil contempt, but reversed the convictions for criminal contempt on the ground that the lower court should have given petitioners the opportunity to present evidence on the question of intent to commit a criminal contempt (R. 213, 239-40; reported at 39 N. J. 436, 189 A. 2d 36 [1963]). Certiorari was granted by this Court on October 14, 1963 (375 U. S. 812).

Statutes and Constitutional Provisions Involved

The Fifth Amendment of the United States Constitution provides that:

> "No person * * * shall be compelled in any criminal case to be a witness against himself * * *."

The immunity statute involved, N.J.S.A. 32:23-86(5), is a subdivision of an interstate compact known as the Waterfront Commission Act, which was originally entered into by the States of New York and New Jersey in 1953, with the consent of Congress.* The immunity subdivision was enacted in 1956 in New Jersey (L. 1956, c. 194) and in 1957 in New York (L. 1957, c. 188), pursuant to provisions of the original compact which authorized the Legislature of either State, when concurred in by the other, to enact amendments and supplements to the compact.** The statute is modeled after § 2447 of the New York Penal Law, and is typical of many state immunity statutes. Its text is set forth in full in the Appendix to this brief.

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* 67 Stat. 541, Act of Aug. 12, 1953, c. 407. The compact is codified in N.J.S.A. 32:23-1 *et seq.* and in McKinney's Unconsolidated Laws of N. Y. §§ 9801 *et seq.* The compact created the Waterfront Commission as an agency of both states, with power to regulate labor and hiring practices on the waterfront in the Port of New York Harbor. The Commission is empowered to investigate waterfront practices and other matters bearing on the compact's objective of eliminating evil conditions on the waterfront of the Harbor. See the opinion of the Court below, R. 213, 222-26.

** See N.J.S.A. 32:23-70.

Questions Presented

While additional issues have been raised in the briefs of the parties, our concern as *amicus* is with the validity of state immunity statutes. Consequently, we confine our discussion to the following question:

> May an individual be punished for contempt for refusing to testify before a state investigating body, on grounds of possible self-incrimination under federal law, despite having been granted immunity from state prosecution?

In answering this question in the affirmative, we consider particularly the following three questions:

1. Assuming that use in a federal court of evidence obtained pursuant to a grant of state immunity would violate an individual's privilege against self-incrimination, are adequate means available to the federal courts to protect against the use of such evidence?

2. Assuming that the Fifth Amendment privilege against self-incrimination extends to the states through the Fourteenth Amendment, does the privilege include a right to refuse to testify in a state inquiry as to matters which might be incriminating under the laws of a different sovereignty, particularly where prosecution in the other sovereignty on the basis of such evidence is an extremely remote possibility?

3. Do the circumstances of this particular case—in which the assertion of a right to refuse to testify in a state proceeding, solely on grounds of possible federal prosecution, must be balanced against the extreme remoteness of the possibility of federal prosecution based on such testimony (or its "fruits") and against strong public interests in the prevention of crime and

the maintenance of a federal system of government in which the states are primarily responsible for criminal law enforcement—show a violation of due process?

Summary of Argument

I

The particular problem posed is that of possible prosecution under federal law, on the basis of information obtained pursuant to a state grant of immunity from prosecution. The problem is, however, more illusory than real—such evidence is rarely, if ever, used by a federal prosecutor, and in any event it is clearly within the power of the federal courts to prevent the use of state-compelled testimony, or its "fruits", in a federal criminal proceeding.

In only one case—*Feldman* v. *United States,* 322 U. S. 487, decided twenty years ago (1944)—did this Court permit the use of such evidence in a federal prosecution. It is apparent from the absence of challenges to federal convictions based on use of such evidence, despite the willingness expressed by four of the present Justices to reexamine the *Feldman* rule, that the *Feldman* decision is simply not availed of by federal prosecutors. Indeed, the rationale of the *Feldman* opinion ~~had~~ has been weakened by the Court's abandonment, in the area of federal use of illegally obtained evidence, of the "silver platter" doctrine upon which the *Feldman* opinion relied. *Cf. Elkins* v. *United States,* 364 U. S. 206 (1960). In view of the Court's decisions recognizing the inadmissibility in a federal prosecution of confessions involuntarily adduced, as well as of evidence seized in an illegal search, a federal conviction based upon evidence obtained pursuant to a grant of immunity from state prosecution seems subject to question.

In the event that a federal prosecutor did seek to use an individual's state-compelled testimony, or its "fruits" against him, it would be open to the defendant to move in the federal court to suppress the evidence prior to trial, or to object to its introduction at the trial. The pre-trial motion to suppress has proven quite adequate to handle problems arising in federal prosecutions where a defendant fears use against him of evidence obtained as the result of an illegal search or wiretap. Surely the same procedure could be equally effective in preventing use of testimony compelled pursuant to a grant of immunity from state prosecution.

It is not necessary to prevent the *production* of testimony in a state proceeding in order to protect against its *use* in a federal prosecution—a federal right of protection from use of self-incriminating state-compelled testimony can be quite adequately protected simply by refusing to permit use of such testimony, or its "fruits", against a defendant in a federal prosecution. Federal law enforcement would not thereby be hindered (since a federal prosecutor would simply be in the same position as if the defendant had never testified in a state proceeding), and the state immunity statutes so essential to crime investigation and law enforcement would thereby be preserved.

II

Assuming the privilege against self-incrimination is to be regarded as a fundamental part of due process, binding upon the states (*cf. Malloy* v. *Hogan*, 150 Conn. 520, 187 A. 2d 744 [1963], *cert. granted* 373 U. S. 948 [1963], No. 110, Oct. T. 1963), we are nonetheless concerned in this case with only a peripheral aspect of the privilege—*i.e.*, with the problem of whether the privilege against self-incrimination includes right to refuse to testify as to matters which can only be incriminating under the laws of another sovereignty.

We note that it is only where there is some real and substantial possibility of prosecution of him on the basis testimony sought to be elicited, that an individual's assertion of a privilege against self-incrimination will be sustained. The fact that the only possible prosecution would be under the laws of a different sovereignty is, of course, a factor to be considered in determining the remoteness of the possibility. Particularly where the other sovereignty —here, the federal government—has developed a clear policy against use in its own prosecutions of evidence involuntarily adduced from an individual, there is no reason to recognize the assertion of the privilege.

The fact that the only possibility of prosecution is under the laws of another sovereignty is relevant in another way, too—since the principal justification for the existence of the privilege against self-incrimination is that it helps deter abuses by a government in the enforcement of its own criminal laws, no policy basic to the relation of government and governed would be served by construing the privilege to provide protection against possible prosecution under the laws of another sovereignty.

III

As is the case with any due process claim, petitioners' assertion of a right to refuse to testify in a state inquiry, on the ground of a claimed possibility of incrimination under federal law, must be weighed against competing societal considerations. We note five such considerations which, we submit, militate against holding that due process has been violated in this particular case: (1) the extreme remoteness of the possibility of federal prosecution; (2) the fact that the federal courts could adequately protect against the use of state-compelled testimony, or its "fruits", in the event that a federal prosecutor did seek to use such evidence against an individual; (3) the fact that the sovereignty seeking the testimony cannot possibly convict the individual of any violation of its own laws; (4) a strong public interest in investigating criminal activity and enforcing state criminal laws; and (5) a strong public interest in maintaining a federal system in which the states are primarily responsible for enforcement of the criminal law.

ARGUMENT

POINT I

Assuming that the privilege against self-incrimination would be violated by the use against an individual, in a federal prosecution, of evidence obtained pursuant to a grant to him of state immunity, the states should not be barred from penalizing persons who refuse to testify despite having been granted immunity from state prosecution.

Petitioners' primary contention (Br., pp. 22-28, 34-56) is that their refusal to testify before the Waterfront Commission was justified, notwithstanding the Commission's grant of immunity from state prosecution, because their testimony might subject them to incrimination under federal law.

Petitioners' claimed fear of federal prosecution is asserted on the basis of this Court's decision in *Feldman* v. *United States*, 322 U. S. 487 (1944). There, a federal mail-fraud conviction was affirmed over a contention that the defendant's privilege against self-incrimination was violated by the use of testimony he had given in a state civil proceeding pursuant to statutes granting him immunity from state prosecution for matters revealed in the testimony but requiring him to testify under penalty of a contempt order. The Court's subsequent decisions in *Knapp* v. *Schweitzer*, 357 U. S. 371 (1958), and *Mills* v. *Louisiana*, 360 U. S. 230 (1959), have held that the privilege against self-incrimination is not violated by a state contempt conviction for refusing to testify before a state agency after being granted immunity from state prosecution. Hence, petitioners picture themselves as caught on the horns of a dilemma when called before the Waterfront Commission: they suggest that they could either remain silent and risk state contempt proceedings, or answer the Commission's questions and risk federal prosecution.

The claimed dilemma, however, is more fanciful than real. Not only is federal prosecution on the basis of such testimony highly unlikely as a practical matter, but the use of both the testimony itself, and its "fruits", can be precluded by the federal courts, if indeed such use would be violative of an individual's constitutional rights.

A. The likelihood of federal prosecution or conviction on the basis of evidence obtained through a state grant of immunity is extremely remote.

The fact that petitioners fail to cite a single post-*Feldman* decision in which state-compelled testimony has been used as a basis for federal prosecution is significant as indicating that their professed fear of such prosecution is unfounded. Although the *Feldman* case is on the books, there is absolutely no indication—either in the record before this Court or in the cases decided since 1944—that federal prosecutors do attempt to introduce against a defendant evidence obtained as a result of immunity granted him from state prosecution. It appears that such evidence simply is not used to obtain federal convictions—quite possibly because of a belief on the part of federal prosecutors that such convictions would be subject to challenge. Despite the fact that *Feldman* itself was decided by only a 4-3 vote, and that four Justices of the present Court—enough to grant certiorari—have expressed their willingness to re-examine that decision,* there have been no challenges to federal convictions based on such evidence which have reached this Court in the twenty years which have since elapsed.*

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* Concurring opinions of Mr. Justice Brennan in *Knapp* v. *Schweitzer*, 357 U. S. 371 (1957) at 381-82 and *Mills* v. *Louisiana*, 360 U. S. 230 (1958) at 230-31; dissenting opinions in the same cases of Mr. Chief Justice Warren, 357 U. S. at 381-82 and 360 U. S. at 231-39; Mr. Justice Black, 357 U. S. at 382-85 and 360 U. S. at 236-39; and Mr. Justice Douglas, 357 U. S. at 382-85 and 360 U. S. at 236-39.

Particularly in view of this Court's holding in *Elkins* v. *United States,* 364 U. S. 206 (1960), a defendant facing federal prosecution and fearing the use against him of testimony previously elicited from him under a grant of state immunity (or the "fruits" of such testimony) could be expected to proceed by a motion prior to trial to quash the indictment or to suppress such evidence, or by objection to its admission at the federal trial. Indeed, it is at least arguable that the *Elkins* decision—putting an end to the "silver platter" doctrine under which evidence obtained through illegal search and seizure solely by state officers had been admissible in federal prosecutions—has overruled *Feldman* sub silentio. See *Elkins* v. *United States,* 364 U. S. 206, 210 (1960). The majority opinion in *Feldman,* which relied heavily on the now-abandoned silver platter doctrine (see 321 U. S. 487, 492-94), must be appraised in the light of the more recent decisions of this Court recognizing the inadmissibility in federal prosecutions of coerced confessions (see *Shotwell Mfg. Co.* v. *United States,* 371 U. S. 341, 347-48 [1963]) and illegally obtained evidence (see *Elkins* v. *United States, supra*). See also *Bram* v. *United States,* 168 U. S. 532, 542-43 (1897); *Wan* v. *United States,* 266 U. S. 1, 14-15 (1924). The posture of the cases would appear to render remote and highly improbable a federal conviction based upon evidence obtained pursuant to a grant of immunity from state prosecution. The time to deal with the problem of use of such evidence in a federal prosecution is when and if a federal prosecutor attempts to make use of it. *Cf. Poe* v. *Ullman,* 367 U. S. 497, 507-09 (opinion of Mr. Justice Frankfurter, concurring opinion [at 509] of Mr. Justice Brennan) (1961).

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* In fact, our "Shepardizing" of *Feldman* v. *United States,* 322 U. S. 487 (1944), fails to reveal a single reported case in which a federal conviction has been challenged on appeal on grounds of use of evidence obtained as a result of a state grant of immunity.

B. Adequate means are available to the federal courts to prevent use against an individual, in a federal prosecution, of evidence obtained through state-compelled testimony. It is not necessary, therefore, to invalidate state immunity statutes.

Petitioners suggest (Br., pp. 26-27, 44-48), citing the Chief Justice's dissent in *Mills* v. *Louisiana,* 360 U. S. 230, 235-36 (1958), that even a direct overruling of *Feldman* would not protect against use of the "fruits" of state-compelled testimony, as opposed to use of the testimony itself, in a federal prosecution. This suggestion, however, ignores the practical possibilities available to a defendant to guard against the use of such evidence.

Either a motion to suppress the evidence prior to trial (*cf.* Fed. R. Crim. Proc. 41 [e]; *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 278 [1936]), or an objection to its introduction at trial (*cf. Brown* v. *Mississippi,* 297 U. S. 278 [1936]) should suffice to protect against infringement of an individual's right not to testify against himself. To the extent that use of the "fruits" of state-compelled testimony might amount to a violation of constitutional rights, the individual would be adequately protected by the "fruit of the poisonous tree" doctrine availed of in wiretap and search and seizure cases (*cf. Nardone* v. *United States,* 308 U. S. 338, 341 [1939]; *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385 [1919]).*

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* It should be noted that this would not hinder federal law enforcement at all—if evidence obtained as a result of a defendant's prior testimony under state grant of immunity were to be secured from use against him in a federal trial, the federal prosecutor would be in the same position as if the defendant had never testified at the state proceeding at all. Information independently obtained could, of course, be used against the defendant at a federal trial, regardless of any prior state testimony under grant of immunity.

In the *Nardone* case, the Court suggested a practical way for federal courts to handle the problem of possible use against a defendant of information obtained as a result of illicit wiretapping in violation of § 605 of the Communications Act of 1934 (308 U. S. at 341):

> "A sensible way of dealing with such a situation—fair to the intendment of § 605, but fair also to the purposes of the criminal law—ought to be within the reach of experienced trial judges. The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that wire-tapping was unlawfully employed. Once that is established—as was plainly done here—the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin."

Without conceding that the "tree" itself is poisonous where it consists of testimony lawfully obtained pursuant to a grant of immunity from state prosecution, we submit that this suggested procedure would very adequately protect against use of state- compelled testimony in the federal courts.* Indeed, just such a procedure has already been employed by at least one experienced federal judge where, in denying a pre-trial motion to suppress such evidence, he noted that the Government did not intend to put to the jury any statement made by any defendant under a grant of state immunity; that the Government had denied getting any information from the state-compelled testimony that it did not already have from independent sources; and that nothing to the contrary had been shown. (See *United States* v. *Bonanno*, 178 F. Supp. 62, 68 n. 13 (S.D.N.Y. 1959) (Kaufman, J.).

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* Petitioners themselves implicitly acknowledge the feasibility of such a procedure. In their brief (pp. 50-52), they object to the Superior's Court's refusal of their requests for discovery on the question of federal-state cooperation. We submit that the Superior Court was clearly correct in refusing these requests, but that such a procedure would be very much in order in a federal court where petitioners had actually been indicted and had reason to fear that their state-compelled testimony, or its fruits, might be used against them in the federal prosecution. Our point is simply that in seeking such discovery in the state court—as in now attacking their contempt convictions on the basis of a highly speculative possibility of federal prosecution—these petitioners ask the courts to act prematurely.

Mr. Justice Douglas points out, in his dissenting opinion in *Mills* v. *Louisiana*, 360 U. S. 230, 236, 238-39 (1958), that if evidence obtained from an individual pursuant to a state grant of immunity were barred from use against him in a federal proceeding, protection of a federal right against self-incrimination could be left to the federal courts. We submit, however, that it does not at all follow that, because the *Feldman* case happens to be on the books, the only or appropriate way to protect against such use is to prevent the production of testimony, in a state proceeding, pursuant to a grant of state immunity. Clearly, any federal right against self-incrimination would be fully protected simply by refusal to permit the introduction of such evidence at a federal criminal trial. And, if such evidence cannot be used against an individual in a federal prosecution, there is no reason to prevent the states from requiring him to testify—once granted immunity from state prosecution, his testimony could not incriminate him under either state or federal law.

No federal right is left unprotected by permitting the states to compel such testimony under pain of a contempt order. Assuming the existence of a federal right to be free from incrimination on the basis of one's own testimony under grant of state immunity, that right can be adequately protected without overruling the *Knapp* and *Mills* decisions—but an overruling of *Knapp* and *Mills* would strike a crippling blow at the states' efforts to investigate criminal activity and to enforce and improve their criminal laws.

POINT II

Even assuming that the Fifth Amendment privilege against self-incrimination extends to the states through the Fourteenth Amendment, one who is granted immunity in a state inquiry may not refuse to testify as to matters which might incriminate him under the laws of a different sovereignty, particularly where there is only a very remote possibility of the other sovereignty using his testimony against him.

Assuming that the right of an individual not to be a witness against himself is to be regarded as a fundamental part of due process, binding upon the states (*cf. Malloy* v. *Hogan,* 150 Conn. 520, 187 A. 2d 744 [1963], *cert. granted,* 373 U. S. 948 [1963], No. 110, Oct. T. 1963), we can conceive of four situations in which this constitutional right might be asserted by an individual:

> (1) As a defendant in a federal prosecution, when incriminating information obtained through his own prior involuntary disclosures is sought to be introduced into evidence against him.
>
> (2) As a witness in a federal proceeding—criminal, civil, judicial, investigative or administrative—when he is requested to give testimony which might tend to incriminate him.
>
> (3) As a witness in a state proceeding, when he is requested to give testimony which might tend to incriminate him.
>
> (4) As a defendant in a state prosecution, when incriminating information obtained through his own prior involuntary disclosures is sought to be used against him.

In situations (1) and (4) the constitutional right would be asserted to protect against the *use* against the individual of information obtained through the individual's own involuntary disclosures regardless of where made. In situations (2) and (3), the right would be asserted to protect against the *production* of testimony which could be used to incriminate the individual—under the laws of the same or of a different sovereignty. Our immediate concern is with one aspect of the third type of situation—i.e., assuming that an individual has a "fundamental right", assertable in a state proceeding, to refuse to answer a question on the ground that his answer might tend to incriminate him, does that right include a further right to refuse to testify as to matters which could only be incriminating under the laws of another sovereignty? We urge (A) that there is no warrant for recognizing the hypothesized further right where the possibility of prosecution under the laws of another sovereignty is remote or non-existent; and (B) that even where there is some substantial possibility of such prosecution, the policy underlying the privilege against self-incrimination is inconsistent with its use as a shield from possible incrimination under the laws of another sovereignty.

A. A privilege against self-incrimination should not be recognized where the person claiming its protection faces only a remote possibility of prosecution on the basis of the testimony sought to be elicited from him.

In those situations where testimony is sought to be elicited from an individual, it is only the possibility of its ultimate use against him which can conceivably sustain his refusal to testify. If there is no actual likelihood of prosecution on the basis of the testimony (or its "fruits"), then the right to exercise a privilege against self-incrimination will not be recognized in either federal or state courts. See, *e.g., Mason* v. *United States,* 244 U. S. 362, 365-66 (1917); *Hoffman* v. *United States,* 341 U. S. 477, 486 (1951); *In re Pillo,* 11 N. J. 8, 19, 93 A. 2d 176, 181-82 (1952); and see 8 Wigmore, EVIDENCE § 2272 (McNaughton rev. 1961).

Thus, for example, an American citizen having no contacts with a foreign nation could scarcely be heard to argue that a danger of incrimination under the laws of another nation could justify him in refusing to testify in either a federal or state proceeding. Similarly, a witness in a federal proceeding who has been granted immunity pursuant to a federal statute providing that his testimony can not be used against him in any proceeding in any court is foreclosed from refusing to testify on grounds of possible incrimination under state law—the federal immunity statute protects him against prosecution under either federal or state law. *United States* v. *Ullmann*, 350 U. S. 422, 434-36 (1956); *Brown* v. *Walker*, 161 U. S. 591, 606-08 (1896).

Even state courts which have held that a privilege against self-incrimination can be asserted to protect against the possibility of prosecution under the laws of another sovereignty have recognized that the danger of such prosecution must be real and substantial. Compare *People* v. *Den Uyl*, 318 Mich. 645, 29 N. W. 2d 284 (1947), and *State* v. *Dominquez*, 228 La. 284, 82 So. 2d 12 (1955), with *In re Watson*, 293 Mich. 263, 284-85, 291 N. W. 652, 661 (1940), and *State* v. *Ford*, 233 La. 992, 1014, 99 So. 2d 320, 327 (1958). Decisions of this Court have also noted the remoteness of a possibility of prosecution in another sovereignty as a reason for rejecting claims that the privilege against self-incrimination should protect against a refusal to testify in the proceedings of the forum. *Cf. Brown* v. *Walker*, 161 U. S. 591, 608 (1896); *Jack* v. *Kansas*, 199 U. S. 372, 382 (1905); *Hale* v. *Henkel*, 201 U. S. 43, 68-69 (1906).

As we have demonstrated in Point I, there is as a practical matter no real danger of use against an individual, in a federal prosecution, of evidence obtained pursuant to a state grant of immunity even under the present state of the law. Assuming that the privilege against self-incrimination is to be regarded as a fundamental part of due process, surely this Court would not permit the use of information obtained through an individual's involuntary testimony to be used against him in the federal courts. This alone is sufficient reason for declining to recognize these petitioners' attempted assertion of a right to refuse to testify despite having been granted immunity from state prosecution.

B. Since the purpose of the privilege against self-incrimination is to deter abuses by a government in the enforcement of its own criminal laws, it should not be construed to provide protection against possible prosecution under the laws of another sovereignty.

Even if there were any real possibility of federal prosecution (or of prosecution under the laws of another state) on the basis of testimony adduced pursuant to a state immunity statute, a right to refuse to testify in a state proceeding on grounds of possible self-incrimination (assuming the existence of such a right as a fundamental part of due process) should not protect against the possibility of incrimination under the laws of another sovereignty. Both the policy behind the privilege, and the case law on the subject, support this view.

While as many as a dozen reasons have been advanced to justify the existence of the privilege against self-incrimination (*cf.* 8 Wigmore, Evidence § 2251 [McNaughton rev. 1961]), we submit that the fundamental policy behind the rule is that of protecting against abuses potentially incident to the enforcement by a government of its criminal laws—*i.e.*, of regulating the relations of government and the governed. As Professor McNaughton has noted, this policy of regulating the government-governed relation really has two aspects: it helps to prevent inhumane treatment of persons from whom information is desired, and it helps satisfy popular sentiment that, "when omnipotent government arrays its forces against solitary governed in mortal combat, the government may in nowise conscript the governed to its aid." McNaughton, *Self-Incrimination Under Foreign Law,* 45 Va. L. Rev. 1299, 1308 (1959); and see 8 Wigmore, Evidence §§ 2251, 2258 (McNaughton rev. 1961).

Viewed in this perspective, as a restraint against the overbearance of a government upon its governed, the privilege against self-incrimination simply has no relevance in situations where crimes against the sovereignty seeking the testimony are not involved. This view of the privilege, as a deterrent against abuses by a government in seeking to prove violations of its own criminal laws, is supported by the past decisions of this Court, and by an overwhelming majority of state court decisions.*

There are two decisions of this Court—*United States* v. *Saline Bank,* 26 U. S. (1 Pet.) 100 (1828), and *Ballman* v. *Fagin,* 200 U. S. 186 (1906)—which have been interpreted in some quarters as supporting the view that the privilege against self-incrimination protects a witness against compulsory disclosure of matters self-incriminating under the laws of another sovereignty. (See, *e.g.,* Kroner, *Self-Incrimination: The External Reach of the Privilege,* 60 Col. L. Rev. 816, 818-19 [1960].) Such a view, however, is clearly inconsistent with the decisions of the Court which have held squarely that the privilege does not protect a witness against self-incrimination under the laws of another sovereignty, and that statutes granting a witness immunity from prosecution under the laws of the forum for matters elicited in testimony are constitutional because they give a witness protection equivalent to the privilege. Moreover, it is anything but clear from a reading of the *Saline Bank* and *Ballman* v. *Fagin* decisions that they support the view that the privilege extends to self-incrimination under the laws of another sovereignty.

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* See 8 Wigmore, Evidence § 2258 n. 6 (McNaughton rev. 1961), for a compilation of the state cases.

United States v. *Saline Bank,* 26 U. S. (1 Pet.) 100 (1828), was a civil suit pursuant to which a bill for discovery was filed in the United States District Court for the Western District of Virginia against stockholders of a Virginia bank. A plea in bar to the bill was sustained in a one paragraph decision by Chief Justice MARSHALL, which noted that (26 U. S. [1 Pet.] at 104):

> "This is a bill in equity for a discovery and relief. The defendant set up a plea in bar, alleging that the discovery would subject them to penalties, under the statute of Virginia. . . . It is apparent, that in every step of the suit, the facts required to be discovered in support of this suit should expose the parties to danger. The rule clearly is, that a party is not bound to make any discovery which would expose him to penalties, and this case falls within it."

The decision does not mention the privilege against self-incrimination at all, and clearly should not be read as standing for the proposition that the privilege protects against prosecution under the laws of another sovereignty. On the contrary, it would appear that the *Saline Bank* decision was merely a reassertion of the long-established equity principle that equity will not aid in a forfeiture. See *United States* v. *Hutcheson,* 369 U. S. 599, 608 n. 13 (1962); 8 *Wigmore,* EVIDENCE § 2250, n. 92 and accompanying text and § 2258, n. 6 [McNaughton rev. 1961]).

In *Ballman* v. *Fagin,* 200 U. S. 186 (1906), the Court upheld the assertion of the privilege against self-incrimination in a case where an individual had been convicted of contempt and imprisoned for refusing to produce a certain book before a federal grand jury. The decision noted that the production of the book would very possibly have disclosed matters incriminating under federal law, as well as furnished evidence in a pending state criminal prosecution. 200 U. S. at 195-96.

The most that can be said for *Ballman* v. *Fagin* is that it raised a possibility that the federal privilege against self-incrimination could be invoked when criminal proceedings in another sovereignty were pending and the danger of self-incrimination was real and substantial. Clearly, however, the possibility of incrimination under the laws of another sovereignty was not necessary to the decision in *Ballman*, in view of the real possibility of incrimination under federal law.

Other Supreme Court cases decided during the same term as *Ballman* seem to rely on two grounds for refusing to recognize the assertion of a privilege against self-incrimination made on the basis of possible prosecution under the laws of a different sovereignty—the remoteness of the possibility of foreign prosecution and the principle that the privilege protects only against prosecution under the law of the forum state. See *Jack* v. *Kansas,* 199 U. S. 372 (1905) and *Hale* v. *Henkel,* 201 U. S. 43 (1906).

The remoteness of a possibility of state prosecution was not discussed at all, however, in *United States* v. *Murdock,* 284 U. S. 141 (1931), a case in which an individual based his refusal to testify in a federal proceeding solely upon grounds of self-incrimination under state law. The claim was rejected in an unanimous decision, in which the rule was stated simply (284 U. S. at 149):

> "full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination."

The lower federal courts have consistently followed the *Murdock* rule in cases where fear of subsequent state prosecution has been claimed as a ground for assertion of the privilege against self-incrimination in federal proceedings. See *Tedesco* v. *United States,* 255 F. 2d 35 (6th Cir. 1958); *Marcello* v. *United States,* 196 F. 2d 437 (5th Cir. 1952). The *Murdock* holding has, of course, been recently reaffirmed in the opinions of this Court in *Knapp*

v. *Schweitzer,* 357 U. S. 371 (1957) and *Mills* v. *Louisiana,* 360 U. S. 230 (1958), where contentions identical to those raised by petitioners in this case were rejected by the Court.

POINT III

The Fifth Amendment privilege against self-incrimination should not be regarded as a fundamental and absolute right to refuse to respond to orderly State inquiry, at least where the State is not seeking to enforce its own criminal laws against the individual whose testimony it requests.

This Court has on a number of occasions stated that the Fifth Amendment privilege against self-incrimination confers rights which can be asserted only in federal proceedings. See, *e.g., Twining* v. *New Jersey,* 211 U. S. 78, 110-114 (1908); *Snyder* v. *Massachusetts,* 291 U. S. 97, 105 (1934); *Palko* v. *Connecticut,* 302 U. S. 319, 323-24 (1937); *Adamson* v. *California,* 332 U. S. 46, 51 (1947); *Knapp* v. *Schweitzer,* 357 U. S. 371, 374 (1957).

There are, we suggest, two principal reasons why the privilege against self-incrimination has thus far been treated by the Court in a somewhat different fashion than the protections afforded by the First, Fourth and Sixth Amendments. *First,* the contexts in which problems involving assertion of the privilege against self-incrimination in state proceedings have come before the Court have not been conducive to a finding that the state action complained of amounted to a deprivation of due process. *Second,* the Court has implicitly recognized that in every case where the privilege is asserted, there are competing considerations to be weighed: the individual's interest in not being forced to convict himself out of his own mouth, and the societal interest in not permitting government to convict its subjects on their own involuntary testimony, must be balanced against the actual possibility of harm to the individual, and against strong public interests in the investigation of crime, the enforcement of state criminal laws and the maintenance of a viable federal system of government.

As with every due process claim, a claim based upon the constitutional protection against self-incrimination must be considered in the circumstances of the particular case. Particularly in the case of the privilege against self-incrimination, which can be asserted in so many different kinds of situations, the competing considerations will inevitably vary in importance from case to case.

Thus, where a defendant in a state prosecution has remained silent throughout his trial, it has been held that the prosecutor's comment upon inferences which might be drawn from such silence did not violate due process (*Twining* v. *New Jersey,* 211 U. S. 78 [1908]; *Adamson* v. *California,* 332 U. S. 46 [1947]), although such comment is impermissible in a federal prosecution (*cf. Bruno* v. *United States,* 308 U. S. 287 [1939]; *Smith* v. *United States,* 268 F. 2d 416 [9th Cir. 1959]). And, while the coerced confession cases indicate that there are undoubtedly instances where testimonial compulsion by a state violates fundamental concepts of fairness (see, *e.g. Rogers* v. *Richmond,* 365 U. S. 534 [1961]; *Haynes* v. *Washington,* 373 U. S. 503 [1963]), it is clearly not every state compulsion of testimony that offends due process. For example, it is well established that—even in a federal proceeding—an individual's assertion of the privilege against self-incrimination will not exonerate him from answering a question unless he has reasonable cause to apprehend danger from a direct answer. See *Mason* v. *United States,* 244 U. S. 362, 365-66 (1917); *Hoffman* v. *United States,* 341 U. S. 479, 486 (1951); *Emspak* v. *United States,* 349 U. S. 190, 206 (1955).

As the foregoing cases demonstrate, the Fifth Amendment privilege against self-incrimination cannot be regarded simply an absolute and unqualified right to silence regardless of the circumstances in which it is asserted. Even the rights to freedom of speech, of the press, or the free exercise of religion, and of peaceable assembly, are qualified to some extent—they may be limited by other legitimate interests of the society in certain kinds of situations. *Cf. Schenck* v. *United States,* 249 U. S. 47, 52 (1919); *Gitlow* v. *New York,* 268 U. S. 652, 666-68 (majority opinion of Mr. Justice SANFORD), 672-73 (dissenting opinion of Mr. Justice HOLMES) (1925); *Bridges* v. *California,* 314 52 U. S. 263 (majority opinion of Mr. Justice BLACK) (1941); *Uphaus* v. *Wyman,* 360 U. S. 72, 81 (majority opinion of Mr. Justice CLARK), 82, 106 (dissenting opinion of Mr. Justice BRENNAN) (1959); *Hamilton* v. *Regents,* 293 U. S. 245, 265-68 (concurring opinion of Mr. Justice CARDOZO) (1934); *West Virginia State Board of Education* v. *Barnett,* 319 U. S. 624, 639 (1943); *Richter* v. *United States,* 181 F. 2d 591 (9th Cir. 1950), cert. denied 340 U. S. 892 (1950).

Not every aspect of a "fundamental right" deserves equal consideration. Freedom to express one's political beliefs at a peaceable assembly, for example, is hardly to be equated with freedom to shout "fire" in a crowded theater. *Cf. Schenck* v. *United States,* 249 U. S. 47, 52 (1919). Similarly, the core of the Fifth Amendment privilege against self-incrimination—the right not to be a witness against oneself, in the most literal sense—ought not to be equated with a claimed right to refuse to testify in a state proceeding solely on grounds of possible self-incrimination under federal law. The latter claim is of a right which would be far indeed from the core of the bundle of rights contained in the Fifth Amendment's privilege against self-incrimination. In such a case, the weight accorded to competing societal considerations must necessarily be greater.

Against the right asserted in the case at bar must be balanced at least the following considerations: (1) the fact that the actual possibility of prosecution in the federal courts, on the basis of testimony as to which the privilege is asserted, is remote or non-existent; (2) the fact that federal prosecution on the basis of such testimony (or its "fruits") can be adequately protected against by the federal courts, without destroying state immunity statutes, when and if the now highly speculative possibility of federal prosecution becomes a reality; (3) the fact that the sovereignty seeking to elicit petitioners' testimony cannot possibly use it to convict petitioners under its own laws; (4) a strong public interest in investigating criminal activity and enforcing state criminal laws, which would be grievously hurt by a denial to the states of the power to compel testimony by granting immunity from state prosecution; and (5) a strong public interest in maintaining a viable federal system in which the states remain primarily responsible for enforcement of the criminal law (*cf. Abbate v. United States,* 359 U. S. 187, 195 [1959]).

CONCLUSION

The judgment of the Supreme Court of New Jersey —sustaining petitioners' convictions of civil contempt for refusing to testify in a State inquiry, on grounds of possible incrimination under Federal statutes, despite having been granted immunity from State prosecution—should be affirmed.

Dated: New York, New York, February 25, 1964.

Respectfully submitted,

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APPENDIX

The immunity statute involved in this case, N.J.S.A. 32:23-86 (5), provides that the Waterfront Commission of New York Harbor shall have the power:

> "To confer immunity, in the following manner: in any investigation, interview or other proceeding conducted under oath by the commission or any duly authorized officer, employee or agent thereof, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and notwithstanding such refusal, an order is made upon twenty-four hours' prior written notice to the appropriate attorney general of the state of New York or the state of New Jersey, and to the appropriate district attorney or prosecutor having an official interest therein, by the unanimous vote of both members of the commission or their designees appointed pursuant to the provisions of section three of article III of this act, that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this subdivision, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein.
>
> "'Immunity' as used in this subdivision means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by the unanimous vote of both members of the commission or their designees appointed pursuant to the provisions of section three of article III of this act, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding.

But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt.

" 'Immunity' shall not be conferred upon any person except in accordance with the provisions of this subdivision. If, after compliance with the provisions of this subdivision, a person is ordered to answer a question or produce evidence of any other kind and complies with such order, and it is thereafter determined that the appropriate attorney general or district attorney or prosecutor having an official interest therein was not notified, such failure or neglect shall not deprive such person of any immunity otherwise properly conferred upon him."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 138

WILLIAM MURPHY and JOHN MOODY, SR.,
Petitioners,

—v.—

THE WATERFRONT COMMISSION OF
NEW YORK HARBOR.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

PAGE

AUTHORITIES CITED

Cases

Cleary v. Bolger, 371 U.S. 392 7

Feldman v. United States, 322 U.S. 487 .... 4, 5, 6

Gotthilf v. Sills, — U.S. —, 11 L. Ed. 2d 159, 32 U.S. Law Week 4007 5

Knapp v. Schweitzer, 357 U.S. 371 .... 4, 6

NAACP v. Alabama, 357 U.S. 449 5

Statutes

Fifth Amendment 1, 2

New Jersey Rule of Court (R.R. 4:87-3) 10, 11

N.J.S. 2A:10-5 11

N.J.S.A. 2A:84A-18, 19 2

N.Y. Penal Law § 530 8

IN THE

Supreme Court of the United States

October Term, 1963

No. 138

William Murphy and John Moody, Sr.,

Petitioners,

—v.—

The Waterfront Commission of New York Harbor.

PETITIONERS' REPLY BRIEF

I

Respondent's major thrust continues to be (as was true in their Brief In Opposition) the argument of "waiver" and "estoppel" in regard to petitioners' right to rely on the privilege against self-incrimination. In Point VI of our brief on the merits herein we anticipated this argument and we dealt with it rather extensively, but respondent's insistence in pressing this argument prompts us to add the following:

Respondent's claim (see p. 29 of their brief) that petitioners did not invoke the *federal* privilege against self-incrimination until they were tendered immunity in the respondent Commission's proceeding of October 27, 1961, overlooks the fact that prior to the latter proceeding, to wit, in the Commission's proceeding of October 3, 1961, petitioners invoked their "constitutional" privilege and they referred expressly to the "Fifth Amendment" (R. 19-31, 36-43, *passim*). This last-mentioned proceeding of October 3, 1961 was the earliest time when petitioners had any occasion to invoke any privilege against self-incrimination—as we have fully explained in Point VI of our main brief—and they did so in terms which leave beyond possible doubt that they were invoking the *federal* privilege. Aside from petitioners having mentioned the Fifth Amendment in the proceedings of October 3, 1961, their reference to the "constitutional" privilege was sufficient in itself to convey this same federal meaning, for the simple reason that there exists no *constitutional* New Jersey State privilege against self-incrimination, this privilege in New Jersey being purely statutory (N.J.S.A. 2A:84A-18, 19—quoted in our main brief at pp. 78-79). We hardly expect respondent to claim that its hearing officer and its counsel at the proceedings of October 3, 1961 were ignorant that such is the law of New Jersey. And we point out that, repeatedly at the hearing of October 3, 1961, respondent's hearing officer and counsel explicitly construed the witnesses' invocation of the privilege as meaning the "constitutional" privilege (R. 19-31, 36-43, *passim*).

Incidentally, in connection with our demonstration in Point VI of our main brief that the respondent Commission on October 3, 1961 expressly recognized petitioners' rights to invoke their constitutional privilege against self-incrimination, we note that this express recognition occurs some 25 or more times in the record (R. 19-31, 36-43, *passim*).

Even as concerns the petitioners' testimony before the respondent Commission in May 1960—which led to the prior contempt of which petitioners were ultimately purged in October 1961 by invoking the privilege against self-incrimination (R. 46)—there is no basis for respondent to argue "waiver" or "estoppel". For in that May 1960 proceeding the counsel for petitioner Moody* expressly stated that although the privilege against self-incrimination was not being asserted "at this time", the privilege would be asserted "when the question arises and we feel any questions would involve any self-incrimination * * * " (R. 195). Thereafter, as just mentioned, the petitioners did assert their privilege against self-incrimination (October 3, 1961), and they were thereupon purged of contempt (October 4, 1961—R. 46); and, be it noted, all of this occurred squarely within the confines of the proceedings which led to the prior contempt conviction, i.e., the very proceedings which respondent goes on stubbornly claiming were the ones in which petitioners waived or were estopped from claiming the privilege.

Our above demonstration that petitioners' right to invoke the privilege against self-incrimination stood expressly reserved by petitioners on the record from the very outset of the original contempt case and that it was ultimately expressly asserted in that same case (resulting in purgation), makes it unnecessary, really, to offer any further reply to respondent's contention that the first and second contempt cases constitute a single continuous proceeding in which (according to respondent's argument) an irretrievable waiver and estopel took place. We would respectfully call the Court's attention to our argument on this at pp. 101-102 of our main brief.

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* Throughout these proceedings all parties have treated points raised on behalf of either petitioner as inuring to the benefit of both of them.

II

Respondent, and apparently also some or all of the *amici curiae*, are willing to have the Feldman case overruled if that is the only way to save the power of the States to extort testimony by conferral of immunity which does not cover federal crimes. We add the following to our main brief on this subject:

Even if this Court in the instant case should both overrule *Feldman* and decline to overrule *Knapp* v. *Schweitzer*, due process would still require a reversal of the contempt convictions of the petitioners Moody and Murphy because these petitioners took their stand in the proceeding below in the light of the existing *Feldman* rule that State-coerced testimony would be admissible against them in a federal prosecution. In that posture of the decisional law of this Court, petitioners were entitled to believe that, by declining the proffered State immunity through fear of federal incrimination, they could realistically thereafter invoke the assistance of this Court against the afflictions of the existing Feldman-Knapp "whipsaw". In other words, had the *Feldman* rule not been in existence at the time of petitioners' commission of the alleged contempt, petitioners and their counsel (who is also their counsel before this Court) would surely have paused before risking petitioners' commission of such alleged contempt. Therefore, if now this Court should overrule *Feldman* but not *Knapp*, petitioners as a matter of due process would be entitled to a vacating of the contempt judgments here under review. Petitioners have never had an opportunity to consider their position in the light of any such change in the *Feldman* rule. Cf. this

Court's language in *NAACP* v. *Alabama,* 357 U.S. 449, 457-458:

> "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in State courts of their Federal constitutional rights."

And see the invoking of the above-quoted principle by the dissenting Justices in *Gotthilf* v. *Sills,* — U.S. —, 11 L. Ed. 2d 159, 162, 32 U.S. Law Week 4007, 4008.

Further as respects the suggestions by respondent and by the *amici curiae* that this whole problem can be swept under the rug by overruling *Feldman*: All of these suggestions in this case are coming from State law enforcement personages. These State personages are blithely saying to this Court, in effect, "Do not curb *our* law enforcement powers; curb the Federal Government's instead." That is, these State personages are saying to this Court that the State immunity powers ought to remain untrammeled and that this will be rendered more palatable constitutionally if the Federal law enforcement authorities are not allowed to benefit from the exposés achieved by the State immunity power. Let the States go on playing the "anti-crime" game in a constitutionally dubious way, is the theme; and this will be alright so long as the Federal authorities are obliged to keep constitutionally clean. This, we submit, falls below the standards of that Constitutional discourse which is fitting in this Highest Judicial Forum of the Land. This is not worthy Constitutional discourse under the doctrinal standards which ought to prevail in a Great Constitutional Case. It is too shrewd. Doctrinal guile has no place in this Forum, least of all in a case involving the Bill of Rights. Besides, all of these suggestions for aggrandizement of the State-law-enforcement power at the expense of the Federal law enforcement power have not had the benefit, in this case, of any expression of the views by the Federal Government's own spokesmen. The Solicitor General has not been heard from in this case. Shall *Feldman* be overruled and *Knapp* v. *Schweizer* be ratified without hearing from the Solicitor General of the United States? To be sure, we well realize that it is not for us to alert the Solicitor General in the present circumstances, and we have not done so nor shall we. But we do feel entitled to bring to the Court's attention, as we are here doing, that an impressive panoply of State law-enforcement officialdom are calling upon this Court to effect a fundamental alteration in the distribution of Federal and State powers of law enforcement, while no Federal voice is being heard on the issue.

And we might add, on this same theme, that unheard from thus far in this case is not only the Solicitor General of the United States in his capacity as the spokesman before this Court for the Executive Branch of the Federal Government, but the latter official is also unheard from in his capacity as one of the Attorney General's delegated legal advisors to the Legislative Branch. Should not there be a voice speaking in this case as *amicus curiae* for the Congress of the United States? Does the Congress want the epochal redistribution of law-enforcement powers—as between the Federal and the State governments— which is sought by the respondent Waterfront Commission and its *amicus* allies?

In short, the suggestion that *Feldman* but not *Knapp* be overruled opens a Pandora's Box of demonic vexations for constitutional policy in this country and for the country's traditional distributive governmental arrangements at the most fundamental levels. Shall an issue of such National magnitude be resolved on the basis merely of the papers of the non-Federal parties and of the non-Federal *amici* presently before the Court?

III

We are obliged to reply, briefly, to some of respondent's suggestions concerning the reasonableness of petitioners' fear of Federal incrimination:

(a) At page 34 of their brief respondents say, referring to the May 1960 work stoppage here involved, that "no Federal prosecutor in the almost four years that have passed has evinced the slightest interest in this matter." Not only is this statement of the respondent absolutely devoid of any basis in the record, but as acutely as possible it focuses attention upon our much-emphasized theme in this case that we were wrongly denied discovery which could have shed light upon this very area.

(b) Similarly, at p. 39 of its brief respondent says, "The record is bare of any evidence of cooperation between the Commission and federal law enforcement officers in *this* case" (emphasis by respondent). This statement in respondent's brief was offered in an effort to meet the quotation in our brief which we took from *Cleary* v. *Bolger*, 371 U.S. 392, 394, where this Court noted that the Waterfront Commission of New York Harbor is an agency which "worked in close cooperation with the Customs Service in matters of law enforcement on the waterfront." Our comment on respondent's above-quoted statement that the instant record shows no specific evidence of cooperation with Federal agencies "in *this*" case, is that here, once again, the refusal of the Courts below "in *this* case" to allow us the discovery procedures which could have illuminated this very area, forms an integral part of the overall constitutional injustice "in *this* case" which so cryingly calls for this Court's intercession.

We would add this one further thought concerning the respondent Waterfront Commission's intrinsic role as a quasi-Federal law enforcement agency: That this agency, by the very nature of its functions, must be continually concerned with the enforcement of Federal criminal laws affecting the interstate and foreign commerce activities on the waterfront of New York Harbor, is dramatically evidenced by the fact that, in all the mountainous efforts that respondent has made in this litigation to find some State rather than Federal "crimes" to which the herein proffered immunity could relate, respondent has been able to come up with only one such State crime or criminal statute, namely, the New York State "coercion" provision (N.Y. Penal Law § 530) (Resp. Br. pp. 38-39). This is what is known in the vernacular as "really reaching", or as coming "from left field".

The real situation is that the functions of the Waterfront Commission of New York Harbor in its anti-crime activities are for all practical purposes not different from the functions which the Federal Bureau of Investigation would perform in that same field; and that conferral of "immunity" by the Waterfront Commission where such conferral leaves the "immunized" person one hundred percent unprotected against Federal incrimination and prosecution is for all practical purposes not only no "immunity" at all but on the contrary spells a virtually sure incriminatory doom at the hands of the Federal law enforcement authorities.

(c) At p. 36 of their brief respondents say that "petitioners' sworn testimony before the Superior Court was that in effect they feared incrimination only for theft". This is absolutely belied by the record (R. 118-140). Moreover, in counsel's oral presentation before the Superior Court (R. *102-106*), in our memorandum of law before that Court, and in our briefs in the State appellate courts, every single one of the Federal criminal statutes which we have cited to this Court as justifying petitioners' reasonable fear of federal incrimination, was cited and discussed. The above mentioned memorandum of law which was filed in the Superior Court, Law Division, was expressly incorporated in the record of the contempt proceedings before that Court (R. 108-109).

(d) Additional indication of the respondent Commission's determination, from an early stage of these proceedings, to incriminate the petitioners in ways which would *ipso facto* import Federal criminal sanctions, is found at R. 19, 23-25 and 35, where the Commission's spokesman admitted that in public pronouncements which the Commission had made concurrently with the instant proceedings the petitioners had engaged with others in a criminal conspiracy relating to the May 1960 work stoppage.

IV

Altogether incomprehensible is respondent's statement at p. 38 of its brief that the question of N.L.R.B. preemption "was not one of the questions presented by petitioners in their petition for certiorari [and] it is of course not properly before the Court.'' We respectfully point out that this question was expressly embraced within and preserved by question no. 3 of our ''Questions Presented'' in our petition for certiorari.

V

At p. 48 of its brief respondent states, by way of answer to our claim that petitioners were denied a constitutionally fair trial on the issue of their intent to commit civil contempt, that ''* * * petitioners, who are free on bond pending this Court's decision, may at any time purge themselves of civil contempt by testifying * * *''. This argument of respondent's overlooks the fact that the sentence under which petitioners rest for the conviction of civil contempt includes a fine of $50. (R. 183). This sentence has been expressly upheld by the Supreme Court of New Jersey (R. 240). The applicable New Jersey statutes and Rules of Court evidently contemplate that such fine of $50., once imposed for civil contempt, remains irretrievably imposed and must be paid whether or not purgation occurs (the pertinent citations will be given in a moment); and that is exactly the way that the Supreme Court of New Jersey on appeal has administered the $50. fine provision in this case (R. 240). The pertinent New Jersey Rule of Court (which has the force and effect of a statute), namely, R.R. 4:87, is quoted in part in the appendix to our main brief, pp. A-7 to A-9; by inadvertence we neglected to quote the third subdivision of this Rule 4:87, which reads as follows (R.R. 4:87-3):

> "4:87-3. Trial; Judgment
>
> The court in its discretion may try the issue without a jury, but this rule shall not supersede any statutory right to trial by jury. Upon the hearing of any charge for contempt other than a contempt stated in Rule 4:87-1, the court shall determine whether the contempt was criminal or civil in nature, or both. Where the contempt is primarily civil in nature and the person in contempt shall have disobeyed a judgment, order or process of the court, he shall stand committed and remain in close custody until the judgment, order or process is obeyed and performed and until such fine as may be imposed for his contempt in accordance with N.J.S. 2A:10-5, with costs, is fully paid, or until the further order of the court. Upon a finding of guilt in a proceeding criminal in nature, the court shall enter an order fixing the punishment."

The provision N.J.S. 2A:10-5 which is referred to in the above quoted R.R. 4:87-3 reads as follows:

> "2A:10-5. Civil contempt; punishment
>
> Any person who shall be adjudged in contempt of the superior court or county court by reason of his disobedience to a judgment, order or process of the court, shall, where the contempt is primarily civil in nature and before he is discharged therefrom, pay to the clerk of the court, for the use of the state or the county, as the case may be, for every such contempt, a sum not exceeding $50. as a fine, to be imposed by the court, together with the costs incurred."

This factor, then, of the existence in our case of a punitive fine for civil contempt which perdures irrespective of purgation, lends to the case, as we urged in our main brief

(Point II) the character of so inextricable an intermingling of the "civil" with the "criminal" contempt features as to entitle us to contend before this Court that all those constitutional incidences of fair procedure which attach to criminal contempt* should attach also to the incongruous "civil" contempt here involved.

CONCLUSION

It is respectfully submitted that the judgment under review should be reversed.

Respectfully submitted,

Harold Krieger,
Attorney for Petitioners

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* Including jury trial, should the presently pending case of Governor Barnett of Mississippi result in the enunciation by this Court of a new requirement of jury trial in criminal contempt.